



# CONSTITUTION OF INDIA

**JAGADISH SWARUP**

WE, THE PEOPLE OF INDIA, having solemnly  
resolved to constitute India into a **SOVEREIGN**  
**SOCIALIST SECULAR DEMOCRATIC REPUBLIC**  
and to secure to all citizens:

**JUSTICE**, social, economic and political;  
**LIBERTY** of thought, expression, belief, faith  
and worship;

**EQUALITY** of status and of opportunity;  
and to promote among them all

**FRATERNITY** assuring the dignity of the  
individual and the unity of the Nation.















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OF  
INDIA**



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## PREFACE

I prefer the frankness of Professor John W. Burges who said in substance "I do not hesitate to declare that our form of Government is the aristocracy of the robe, which I venture to regard as the best form of aristocracy in the world." The Constitution is, what the Supreme Court says. Wherever space has seemed to permit, I have reproduced the language of the Judges of the Supreme Court. This has necessitated many, at times, extended quotations. Since the character of this work requires that the arguments should be given, the authoritative language of the nation's highest tribunal is certainly preferable to a statement by a commentator of his understanding of the courts ruling or reasoning. I have, therefore, refrained from examining the correctness of any particular case decided by the Supreme Court.

In the preparation of this work the aim has been to give a logical exposition of the general principle of the Constitutional law of India. The effort has been to ascertain and to discuss the broad principles upon which have been founded the decisions rendered by the Supreme Court. It is confidently believed that in the present work no important case has been left unnoticed.

There are, however, many words occurring in our written Constitution which have not been the subject matter of judicial precedents. In order to interpret them I have relied on works on Political and Social Sciences. Political Science and Law have traditionally been closely associated.

In the preparation of this book I have often used the excellent work—International Encyclopedia of Social Sciences. I have quoted freely from the works of Professors, Barker MacIver, Rawls and many others. I acknowledge with gratitude the assistance received from them.

At the end I must thank Shri Avinash Swarup who took great pain in bringing out this book. He revised the text, checked the reference with care.

The Commentary on the Constitution will be in two volumes. The First Volume is before the Readers.

• Jagadish Swarup

**Other Works of the Author :**

1. **Legislation and Interpretation**  
3rd Edition, 1984
2. **Human Rights and Fundamental Freedoms**  
Tagore Law Lectures
3. **Commentary on Companies Act**  
3rd Edition
4. **Making of a Good-Lawyer**

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# The Constitution of India

## —Historical Introduction

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#### 1·1. *Viceroy's statement, 16th May, 1946.*

The Cabinet Delegation and the Viceroy issued a statement on 16th May, 1946. In Clause 16 it was said:—

“It is not our object to lay out the details of a constitution, but to set in motion, the machinery whereby a constitution can be settled by Indians for Indians”.

In forming any Assembly to decide a new Constitutional structure the first problem is to obtain as broad-based and accurate a representation of the whole population as is possible. The most satisfactory method obviously would be by election based on adult franchise; but any attempt to introduce such a step now would lead to a wholly unacceptable delay in the formulation of the new Constitution. The only practicable alternative is to utilize the recently elected Provincial Legislative Assemblies as the electing bodies. There are, however, two factors in their composition which make this difficult. Thus the number of seats reserved for Muslims in the Bengal Legislative Assembly is only 48% of the total, although they form 55% of the Provincial population. After a most careful consideration of the various methods by which these inequalities might be corrected, we have come to the conclusion that the fairest and most practicable plan would be—

(a) to allot to each Province a total number of seats proportional to its population, roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage.

(b) to divide this provincial allocation of seats between the main communities in each Province in proportion to their population.

(c) to provide that the representatives allotted to each community in a Province shall be elected by the members of that community in its Legislative Assembly.<sup>1</sup>

## 1.2. *Statement 25th May, 1946.*

In another Statement issued on 25th May, 1946 it was said :

“Once the Constituent Assembly is formed and working on this basis, there is no intention of interfering with its discretion or questioning its decisions. When the Constituent Assembly has completed its labours, His Majesty's Government will recommend to Parliament such action as may be necessary for the cession of sovereignty to the Indian people, subject only to two matters which are mentioned in the statement and which we believe are not controversial, namely, adequate provision for the protection of the minorities (paragraph 20 of the Statement) and willingness to conclude a treaty with His Majesty's Government to cover matters arising out of the transfer of power (paragraph 22 of the Statement).<sup>2</sup>

## 1.3. *Statement in regard to Indian Policy.*

On 20th February, 1947 a statement in regard to Indian Policy was issued by His Majesty's Government.<sup>3</sup>

1. It has long been the policy of successive British Governments to work towards the realisation of self-government in India. In pursuance of this policy an increasing measure of responsibility has been devolved on Indians and to-day the civil administration and the Indian Armed Forces rely to a very large extent on Indian civilians and officers. In the constitutional field the Acts of 1919 and 1935 passed by the British Parliament each represented a substantial transfer of political power. In 1940 the Coalition

1. Nicholas Mansergh: *Transfer of Power* Vol. 7, Clause 18 p. 587-588 no. 303.

2. *Ibid.*, p. 688 no. 376.

3. *Ibid.*, Vol. 9 p. 773 no. 438.

Government recognised the principle that Indians should themselves frame a new constitution for a fully autonomous India, and in the offer of 1942 they invited them to set up a Constituent Assembly for this purpose as soon as the war was over.

2. His Majesty's Government believe this policy to have been right and in accordance with sound democratic principles. Since they came into office, they have done their utmost to carry it forward to its fulfilment. The declaration of the Prime Minister of 15th March last which met with general approval in Parliament and the country, made it clear that it was for the Indian people themselves to choose their future status and constitution and that in the opinion of His Majesty's Government the time had come for responsibility for the Government of India to pass into Indian hands.

3. The Cabinet Mission which was sent to India last year spent over three months in consultation with Indian leaders in order to help them to agree upon a method for determining the future constitution of India, so that the transfer of power might be smoothly and rapidly effected. It was only when it seemed clear that without some initiative from the Cabinet Mission agreement was unlikely to be reached that they put forward proposals themselves.

4. These proposals, made public in May last, envisaged that the future constitution of India should be settled by a Constituent Assembly composed, in the manner suggested therein, of representatives of all communities and interest in British India and of the Indian States.

5. Since the return of the Mission an Interim Government has been set up at the Centre composed of the political leaders of the major communities exercising wide powers within the existing constitution. In all the Provinces Indian Governments responsible to Legislatures are in office.

6. It is with great regret that His Majesty's Government find that there are still differences among Indian Parties which are preventing the Constituent Assembly from functioning as it was intended that it should, it is of the essence of the plan that the Assembly should be fully representative.

7. His Majesty's Government desire to hand over their responsibility to authorities established by a constitution approved by all parties in India in accordance with the Cabinet Mission's plan, but unfortunately there is at present no clear prospect that such a constitution and such authorities will emerge. The present state of uncertainty is fraught with danger and cannot be indefinitely prolonged. His Majesty's Government wish to make it clear that it is their definite intention to take the necessary steps to effect the transference of power into responsible Indian hands by a date not later than June 1948.

8. His Majesty's Government are anxious to hand over their responsibilities to a Government which, resting on the sure foundation of the support of the people, is capable of maintaining peace and administering India with justice and efficiency. It is, therefore, essential that all parties should sink their differences in order that they may be ready to shoulder the great responsibilities which will come upon them next year.

9. After months of hard work by the Cabinet Mission a great measure of agreement was obtained as to the method by which a constitution should be worked out. This was embodied in their statements of May last. His Majesty's Government there agreed to recommend to Parliament a constitution

worked out, in accordance with the proposals made therein, by a fully representative Constituent Assembly. But if it should appear that such a constitution will not have been worked out by a fully representative Assembly before the time mentioned in paragraph 7, His Majesty's Government will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India or in some areas to the existing Provincial Governments, or in such other way as may seem most reasonable and in the best interests of the Indian People.

**1.4. *Lord Mountbatten as Viceroy.***

Lord Wavell was appointed Viceroy in 1943 and it was agreed that his appointment should be a war time appointment. It seemed to the British Government that the opening of a new and final phase in India was an appropriate time to terminate this war time appointment. As successor to Lord Wavell, His Majesty approved the appointment of Viscount Mountbatten who was entrusted with the task of transferring to Indian hands responsibility for the Government of British India in manner that would ensure the future happiness and prosperity of India.<sup>1</sup>

Lord Mountbatten came as a Viceroy. The instruction given to him were (i) to try to obtain a unitary government for British India and the Indian States, through the medium of the medium in a Constituent Assembly sent up in accordance with the Cabinet Mission plan of May 16, 1946 ?<sup>2</sup>

In October 1947 he found that there was no prospect of reaching a settlement on the basis of a unitary government he was to report the steps which he considered should be taken for the handing over of power by June 1948.<sup>3</sup>

Since his arrival at the end of March 1947 Lord Mountbatten spent almost every day in consultation with as many of the leaders and representatives of as many communities and interest as possible but to his great regret it had been impossible to obtain agreement either on the Cabinet Mission's Plan or any plan that would preserve the unity of India. But as there could be no question of coercing any large areas in which one community had a majority, to live against their will under a Government in which another community had a majority, the only alternative to coercion was partition.<sup>4</sup>

**1.5. *His Majesty's Government's statement on method of Transfer of Power.***

On June 3, 1947, a statement was made by His Majesty's Government on the Method of Transfer of Power in India. It said : "The major political parties have repeatedly emphasized their desire that there should be the earliest possible transfer of power in India. With this desire His Majesty's Government are in full sympathy, and they are willing to anticipate the date June 1948 for handing over power by the setting up of an independent Indian Government or Governments at an even earlier date. Accordingly, as most expeditious, and indeed the only practicable way of meeting this desire, His Majesty's Government propose to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to the decision taken as a result of this announcement. This will be without

1. *Atlee's Statement*, 20th February, 1947.

2. *Menon: Transfer of Power in India* p. 351.

3. *Mountbatten: Broadcast*, June 3, 1947.

4. *Menon: Transfer of Power*, p. 382.

prejudice to the right of the Indian Constituent Assemblies to decide in due course whether or not the part of India in respect of which they have authority will remain within the British Common-wealth”.

Finally Lord Mountbatten made it clear that the transfer would be in 1947 and not in June 1948. He said “I think the transfer of power could be about the 15th August 1947”.<sup>1</sup>

**1·6. *British Parliament passed Indian Independence Act, 1947- -Two Dominions created.***

On 18th July, 1947 the British Parliament passed the Indian Independence Act, to make provisions for the setting up in India of two Independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935 which applied outside those Dominion and to provide for other matters, consequential on or connected with the setting up of those dominions.

As from the 15th August, 1947 two independent Dominions to be known respectively as India and Pakistan were set up.<sup>2</sup>

**1·7. *Nehru's statement, 14th August, 1947.***

In the meeting of the Constituent Assembly held on 14th August, 1947, Nehru moved the resolution :—“Long years ago we made a tryst with destiny itself—and now the time has come when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation long suppressed finds utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the still larger cause of humanity”.<sup>3</sup>

After the last stroke of midnight, all members of the Constituent Assembly present on the occasion, took the following pledge :

“At this solemn moment when the people of India, through suffering and sacrifice have secured freedom and become masters of their own destiny. I ..... a member of the Constituent Assembly of India, do dedicate myself in all humility to the service of India and her people to the end that this ancient land attain her rightful and honoured place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind.”<sup>4</sup>

**1·8. *Lord Mountbatten becomes Governor-General.***

The Constituent Assembly endorsed the recommendation that Lord Mountbatten be Governor-General of India from the 15th August, 1947 and it was intimated to the Viceroy Lord Mountbatten that the Constituent Assembly had assumed power for the Governance of India.

1. 10 & 11 George VI c. 30.
2. *Ibid.*, Section 1.
3. *Constituent Assembly Debates*, Vol. 5, p. 4.
4. *Ibid.*, p. 9.

Shrimati Hansa Mehta on behalf of the women of India presented the National flag to the Nation.

On the 15th August, 1947 Dr. Rajendra Prasad, the President of the Constituent Assembly requested the Governor-General to give the signal for hoisting the flag. The sound of a gun being fired was heard and that was the signal for hoisting the Flag over this roof.

By virtue of the Indian Independence Act a completely independent Dominion of India was set up with a wholly independent Legislature and with a completely independent Government free from any kind of fetters as regards their functioning, either from the British Parliament or from the British Government. The Government of the Dominion, however, was still to be carried on in the name of His Majesty the King of Great Britain, by the Governor-General of India to be appointed by His Majesty.

The Indian Independence Act provided that for each of the new Dominions, there shall be a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purpose of the Government of the Dominion.<sup>1</sup>

The Constituent Assembly endorsed the request of the congress leaders that Lord Mountbatten should become the First Governor-General. Soon after its meeting Rajendra Prasad and Nehru went over to the Government House and conveyed to him the request of the Constituent Assembly. Lord Mountbatten feelingly replied, "I am proud of the honour and I will do my best to carry out your advice in a constitutional manner." On the morning of 15 August, Lord Mountbatten was sworn in as Governor-General by Chief Justice Kania and the new Cabinet headed by Nehru was sworn in by the Governor-General.<sup>2</sup>

In his speech Lord Mountbatten said "From today I am your constitutional Governor-General and I would ask you to regard me as one of yourselves devoted wholly to the furtherance of India's interests." He added that he proposed to ask to be released in April 1948 so that India should be at liberty to have one of her own people as her Governor-General."<sup>3</sup>

C. Raja Gopalachari succeeded Lord Mountbatten as Governor-General. Both were appointed by His Majesty the King.<sup>4</sup>

### 1-9. *India becomes an Independent State.*

Before 1947 the position of India as a subject of International law was for a time anomalous. She was a member of the League of Nations; she was invited to the San Francisco Conference of the United Nations in April 1945, she exercised the treaty making power in her own right. However, so long as the control of her internal and external relations rested ultimately with the British Government and British Parliament, she could not be regarded as a sovereign State and as a normal subject of International law. In 1947 she became a fully self governing Dominion and an Independent State.<sup>5</sup>

1. *Indian Independence Act*, Section 5.
2. Menon: *Transfer of Power*, p. 414.
3. *Ibid.*
4. Munshi: *Pilgrimage to Freedom*, p. 264.
5. Oppenheim: *International Law*, Vol. I p. 209.

**1.10. *India becomes member of the British Commonwealth.***

In April 1949, the Government of India, had informed the other governments of the British Commonwealth of the intention of the Indian people that under the new Constitution which was to be adopted, India shall become a sovereign independent republic. The Government of India had also declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nation and as such the Head of the Commonwealth.

The Prime Minister of the United Kingdom, Australia, New-Zealand, South Africa, India, Pakistan and Ceylon and the Canadian Secretary of State for external affairs were in London during April 21-28 to exchange views upon the important constitutional issues arising from India's decision to adopt a republican form of Constitution and her desire to continue her membership of the Commonwealth. The discussions were concerned with the effects of such a development upon existing structure of the Commonwealth and the constitutional relations between the members. The Governments of other countries of Commonwealth, the basis of whose membership of the commonwealth was not thereby changed, accepted and recognised India's continuing membership. Accordingly the United Kingdom, Canada, Australia, Newzealand, South Africa, India, Pakistan and Ceylon placed on record a declaration that they would remain united as free and equal members of the common-wealth of Nations freely cooperating in the pursuit of peace liberty and progress.

On May 10, on his return from London in a broadcast Pandit Nehru said, "The free association of the sovereign nations of the commonwealth does not involve any commitments. Its very strength lay in its flexibility. Any member nation can go out of the commonwealth if it so chooses. The common-wealth is not a super state in any sense of the term. We have agreed to consider the King as the symbolic head of this free association. But the King has no function attached to the states. So far as the constitution of India is concerned, the King has no place in it, and we shall owe no allegiance to him. The King headship of the commonwealth was limited to being symbol of the free association of its independent member nations."

After a two days debate with only one dissent vote the Indian Constituent Assembly on May 17, 1949 approved the decision of the Government of India to remain within the Commonwealth of Nations with the status of an independent republic.

**1.11. *Order passed by the Governor-General under the Indian Independence Act.***

In exercise of the powers conferred upon him by Section 9 of the Indian Independence Act, the Governor-General made an Order, the Indian Independence (International Arrangements) Order, 1947 under which membership of all international organisations together with the rights and obligations attaching to such membership, devolved, solely upon the Dominion of India.<sup>1</sup> Any rights or obligations arising under the Final Act of the United Nations Monetary and Financial Conference became the rights or obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.<sup>2</sup> Rights and obligations under international agreements having an

1. *Indian Independence Act*, Section 2 (1).

2. *Indian Independence (International Arrangements) Order* Schedule 2 (1).

*exclusive territorial application to an area comprised in the Dominion of India; devolved upon that Dominion.*<sup>1</sup>

Under Section 9 read with Section 19 (4), Indian Independence Act, the Governor-General passed an order on 14-8-1947 which substituted the words "Dominion Legislature" for both Houses of Parliament in the proviso to Section 4 of the India (Central Government and Legislature) Act, 1946 and also introduced a new Section 4-A by way of adoption providing that the powers of the Dominion Legislature shall be exercised by the Constituent Assembly.

The Legislature of each of the new Dominions was given full power to make laws for the Dominion including laws having extra territorial operation,<sup>2</sup> and it was declared that no law and no provision of any law made by the legislature of either of the new Dominions would be void or inoperative on the ground that it was repugnant to the law of England; or to the provisions of the Indian Independence Act or any existing or future act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act. The legislature were further given the power to repeal or amend any such Act, order or regulation in so far as it was part of the law of the Dominion.<sup>3</sup>

It was also provided that 'No Act of Parliament of the United Kingdom passed on or after the 15th August, 1947 would extend or be deemed to extend to either of the new Dominions as part of the law of that Dominion unless it was extended thereto by a law of the legislature of the Dominion'.<sup>4</sup>

Section 8 of the Indian Independence Act, 1947 provided that for the purpose of Dominion, the powers of the Legislature of the Dominion shall be exercisable in the first instance by the Constituent Assembly of the Dominion. As a temporary measure it was enacted that except in so far as other provision was made by or in accordance with a law made by the Constituent Assembly of the Dominion under sub-section (1) of this section, each of the new Dominions and all provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding Section 9, have effect accordingly.<sup>5</sup>

Any provision of the Government of India Act, 1935, which, as applied to the new Dominion by sub-section (2) above and the orders therein referred to, operates to limit the power of the legislature of the Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of sub-section (1) of this section have the like effect as a law of the Legislature of the Dominions limiting for the future the powers of that legislature.<sup>6</sup>

Section 9 of the Indian Independence Act gave the Governor-General the power to make such provisions as appeared to him to be necessary or

1. *Indian Independence (International Arrangements) Order, 1947 Schedule 3 (1).*
2. *Indian Independence Act, Section 6 (1).*
3. *Indian Independence Act, Section 6 (2).*
4. *Indian Independence Act, Section 6 (4).*
5. *Indian Independence Act, Section 8 (2).*
6. *Indian Independence Act, 1947, Section 8 (3).*



expedient for bringing the provisions of the Act into effective operation;<sup>1</sup> for making omissions from; addition to, adaptations and modification of, the Government of India Act, 1935, and the Orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions.<sup>2</sup>

In carving out two Dominions certain areas might have to be transferred from a Province to in one Dominion to a Province in another Dominion, and such a transfer would inevitably create difficulties of jurisdiction of the Civil Courts to continue to try proceeding already pending before them. To meet any such contingency the Governor-General made Legal Proceedings Order 1947. Section 4 of this Order provided that not withstanding the creation of new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal, all proceedings pending immediately before the 15th August, 1947, in any Civil or Criminal Court (other than a High Court) in the Province of Bengal, Punjab, or Assam shall be continued in that Court as if the said Act had not been passed and that Court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day. Any appeal or application for revision in respect of any proceedings so pending in any such court shall lie in the Court which would have appellate, or as the case may be, revisional, jurisdiction over that court if the proceedings were instituted in that court after the 15th August, 1947 the appointed day; and effect shall be given within the territories of either of the two Dominions to any judgment or decree order or sentence of any such court in the said proceedings as if it had been passed by a court of competent jurisdiction within that Dominion.<sup>3</sup>

This order was, therefore, made with the object of avoiding unnecessary complications or hardship to the litigants, and so it provided that the proceedings covered by it which were pending at the material time should be continued as if the Act had not been passed. In other words, a departure was deliberately made, from the normal rules or private international law in regard to the enforceability of foreign judgment.<sup>4</sup>

In *Associated Hotel of India v. Jodhamal*<sup>5</sup> the appellant had obtained decree against the respondents from the court of sub-ordinate Judge, Lahore in a suit filed after October 1947. He wanted to execute the decree in India and relied on Section 4 (3) of the Order. The Supreme Court held that Section 4 (1) applied only to such decrees in respect of which the jurisdiction of the trial Court had been effected by the passing of the Indian Independence Act or by the transfer of certain territories. The suit was properly filed in the Court at Lahore and the jurisdiction of the said Court to try the suit was in no manner affected by the passing of the Act or the transfer of territory. The decree could not be executed in India by virtue of subject.<sup>5</sup>

The Governor-General made another order: the Indian Independence (Rights, Property & Liabilities) Order, 1947. The provisions of this Order related to the initial distribution of rights, property and liabilities consequential on the setting up of the Dominions of India & Pakistan.<sup>6</sup>

1. *Indian Independence Act*, Section 9 (1) (a).
2. *Indian Independence Act*, Section 9 (1) (c).
3. Clause 4 (1) (2) (3).
4. *Associated Hotels of India v. Jodhamal*, 1961 S. C. 156 (160): (1961) 1 SCR 259.
5. (1961) 1 SCR 259: 1961 SC 156 (164).
6. *Indian Independence Order*, 1947 Clause 3 (1).

All land which immediately before the appointed day was vested in His Majesty for the purposes of the Governor-General in Council which was situate in India or in the tribal areas on the borders of India, came under the control of the Dominion of India; in the case of land which immediately before the 15th August, 1947 was used for the purposes of any official representative of the Government of India in any other part of His Majesty's dominions or in a foreign country, also came under the control of the Dominion of India.<sup>1</sup>

Any land which, came under the control of the Dominion of India and which was situated in an Indian State, shall, if within one month from the 15th August, 1947 the State acceded to the Dominion of India be under the control of that Dominion as from the date on which the accession of the State became effective.<sup>2</sup>

Similar provisions were made in respect of lands situate in Bengal, Punjab and in Assam.<sup>3</sup>

Provisions were made in respect of contracts made on behalf of the Governor-General in Council before the appointed day.

If the contract was for purposes which as from that day were exclusively purposes of the Dominion of Pakistan it would be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and in any other case, a contract would be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council:

All rights and liabilities, which had accrued or might accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be.<sup>4</sup>

"Any contract made on behalf of the Governor-General-in-Council before the appointed day shall, as from that day,

(a) if the contract is for the purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and

(b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council; and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be."<sup>5</sup>

The intention of this order was to apportion all the liability of the Dominions of India and Pakistan after their creation under the Independence Act. This article appears to import a legal fiction by which any contract

1. *Indian Independence Order, 1947* Section 4 (a) (c).

2. *Ibid.*, Section 4 Proviso.

3. *Ibid.*, Section 8 (1).

4. *Ibid.*

5. *Ibid.*, Section 8 (1) (3).

which was made by any of the two Governments would incur the rights and liabilities which might have accrued to them as on August 15, 1947. In *Union of India v. Chaman Lal Loona*,<sup>1</sup> the contract was made before 15-8-47. It was pointed out that the first part of Article 8 (1) created a legal fiction under which even if a contract was made before August 15, 1947, it would be deemed have been made on behalf of the Dominion of Pakistan, if it was for the purposes of the Dominion of Pakistan. In other cases it would be deemed to have been made on behalf of the Dominion of India. The Supreme Court fully endorsed the observations of Chagla, J in *Union of India v. Chinnubhai Jeshingbhai*<sup>2</sup> and approved the following observations made by the Chief Justice.

“The test to be applied with regard to this contract is not whether the contract was for the purposes of the Dominion of Pakistan at the date when it was made. *Ex hypothesi* that test is clearly inapplicable. All contracts contemplated by Art. 8 must be contracts which when made were made by undivided India by the Governor-General in Council. The test that must be applied is an artificial test and the test may be either, if the contract had been entered into on August 15, 1947, whether it would have been a contract for the purposes of the Dominion of Pakistan, or if the Dominion of Pakistan, had been in existence when the contract was entered into, whether it would have been a contract for the purposes of Pakistan.”

In the case before the Supreme Court the contract in question was for supply of *bhusa* to the military Department at Lahore and was entered in November 1945, that is to say, two years before the appointed date *viz.* 15-8-47. Since, however, the fodder was to be supplied at Lahore, it was held that the liability for payment of the price of the fodder lay with the Dominion of Pakistan and not with India. To the same effect is a later decision of the Supreme Court in the case of *Scindia Steam Navigation Co. Ltd. v. Union of India*<sup>3</sup> where it was pointed out as follows: “In applying the tests prescribed by the Order it would be relevant to enquire to whom the property or goods which is the subject matter of the contract belonged on the appointed day. In other words the main test to apply as to on which of the two Dominions the liability for payment of the goods under contract would lie was to enquire and determine to whom the property or the goods were to be supplied. In *Union of India v. Upper Douab Sugar Mills Ltd.*<sup>4</sup> the goods in question *viz.* 100 tons of Sugar were purchased by the North Western Railway and were to be supplied to all the places which formed part of Pakistan on 15-8-47. The goods were delivered to Station Master, Shamli but in the course of transmission they were looted. The plaintiff claimed price from the Union of India under Article 8 (1). It was held that Union of India would not be liable for making any payment even if the goods had been delivered at Shamli which was in India. The dominant factor to be considered, said the Supreme Court, was not the places where the goods were delivered but the destination to which the goods were to be sent.

The Governor-General may make an Order whenever it appeared to him necessary or expedient in connection with any of the matters mentioned in

1. 1957 SCR 1039: 1957 SC 652.

2. 1953 B 13.

3. *Scindia Steam Navigation Co. Ltd. v. Union of India*, 1966 S.C. 1810.

4. 1980 (2) SCC 310 : 1980 S.C. 1311.

Section 9 Clauses (a) to (h), for varying the Constitution, powers and jurisdiction of any Legislature, Court or other authority in the Dominion of India and creating new Legislatures, Courts or other authority therein.<sup>1</sup>

All liabilities in respect of such loans, guarantees and other financial obligations of the Governor-General in Council or of a Province as were outstanding immediately before 15 August, 1947 became as from that day in the case of liabilities of the Governor-General in Council the liabilities of the Dominion of India ; in the case of liabilities of any province other than Bengal or the Punjab, became to be liabilities of that Province.<sup>2</sup>

What is the meaning of the words 'financial obligation in the context in which it was used.

The phrase 'loans, guarantees and other financial obligations' occurred in Section 178 in Part VII of the Government of India Act, 1935 and these expressions used in that section did not refer to all and sundry pecuniary obligations of the State arising out of contracts of every description. The loans and guarantees there referred to meant, the special kinds of contracts relating to State loans and State guarantees. In that context, 'financial obligations' would mean obligations arising out of arrangements or agreements relating to State finance such as distribution of revenue, the obligation to grant financial assistance by the Union to any State, or the obligation of a State to make contributions and the like. In the above case Das, J. said "It is however not necessary or desirable to attempt an exhaustive definition of the expression "financial obligations". The Court will have to consider in each case whether particular obligation which may be the subject matter of discussion falls within the expression "financial obligation" within the meaning of Art. 9. Whatever liabilities may or may not come within that expression, the liability to pay rent under a lease did not come within that expression."<sup>3</sup>

The powers conferred on the Governor-General under Section 9 of the Independence Act shall, in relation to their respective provinces, be exercisable also by the Governors of the Provinces which, under that Act, were to cease to exist ; and those powers shall be for the purposes of the Government of India Act, 1935, be deemed to be matters as respects which the Governors were under that Act, to exercise their individual judgment.<sup>4</sup>

### 1.12. *Members of the Indian Civil Service.*

Prior to 15-8-1947, persons serving in the Indian Civil Service (were recruited by the Secretary of State for India by virtue of the powers conferred on him under Section 244 (1), Government of India Act, 1935, (or under the corresponding provisions in the prior Government of India Acts.) The persons so recruited were appointed to the service called the Indian Civil Service. Each person so recruited had to enter into a covenant by means of an indenture between himself and the Secretary of State.

The Indenture recited that the person was appointed by the Secretary of State to serve His Majesty as a Member of the Civil Service of India and that such service was to continue during the pleasure of His Majesty, to be signified

1. *Indian Independence Act, Section 9 (1).*
2. *Indian Independence Order, 1947 Section 9.*
3. *State of West Bengal v. Batley, 1954 SC 193 (194).*
4. *Indian Independence Act, Section 9 (2).*

under the hand of the Secretary of State for India with liberty for the covenantors to resign the said service with the previous permission of Secretary of the State or of the Government under which he was, for the time being serving.

The indenture incorporated various covenants by the appointee with reference to the exercise of his functions during the period of his service. Apart from these covenants, his tenure was regulated by a number of statutory provisions under the Government of India Act. Section 240, while affirming that the service was at the pleasure of His Majesty provided that dismissal or reduction in rank should be preceded by a reasonable opportunity for showing cause against the action proposed and that dismissal or removal from service could only be by an authority not subordinate to the appointing authority which in this context meant the Secretary of State.

The Government of India Act, 1935 contained also a number of provisions specially applicable to a person recruited by the Secretary of State regarding the conditions of his service as regards pay, leave, pension and other matters.

He had the right to approach the Governor-General or the Governor in the exercise of their individual judgment if he had any grievance or complaint in respect of his service and a right of appeal to the Secretary of State as against the order of any authority which punished or formally censured him or interpreted any rule to his disadvantage.<sup>1</sup>

It will be seen that the tenure of an Indian Civil Servant was basically contractual but with conditions and prospects of such service regulated by statute. A person recruited to such service was in a very special position, in comparison with persons holding other civil posts of the Government of India or the Provincial Government. He enjoyed a number of rights and privileges attached to him by virtue of the fact that he belonged to a specially recruited service with certain high posts reserved for him and having the right of appeal to the Secretary of State in respect of matter relating to his service, by virtue of Sections 244, 246, 247, 248 and 249. The Indian Civil Service was a specially privileged class of service under the Crown with the essential characteristic of direct and ultimate protection by the Secretary of State representing His Majesty's Government.<sup>2</sup>

Fundamental changes were brought about in this behalf by the Indian Independence Act. In the first instance the Secretary of State who, as a Member of British Cabinet, acting in the name of the Crown and responsible to the British Parliament, was exercising such control as was vested in him in respect of the affairs of India and in particular as regards these services, completely disappeared. It was specifically provided by section 7 (1) (a), Indian Independence Act, 1947 that "His Majesty's Government in the United Kingdom had no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India." There was a further specific provision by way of Section 10 in the Indian Independence Act as regards the Secretary of State's services which was as follows :

"The provisions of this Act keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act, relating to appointments to the civil services, of and civil

1. *Indian Independence Act*, Section 248.

2. *State of Madras v. Rajagopalan*, 1955 SC 817 (826).

posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts.”

The India (Provisional Constitution) Order of 1947, which was issued by the Governor-General on 14.8.1947, under the power of adaptation vested in him under Section 9 (1) (c), Indian Independence Act and which was to come into operation simultaneously with it, gave effect to the above two provisions, viz. Section 7 (1) (a) and Section 10 (1). Indian Independence Act, by specifically deleting from the Government of India Act, 1935, various sections relating to the Secretary of State and his services, i. e., Sections 244, 246, 248 and 249 and 278 to 284-A (vide schedule to the India (Provisional Constitution) Order, 1947.

Changes were also made by the same Order in Sections 240 and 247 relating to conditions of service whose chief purpose was to withdraw the responsibility of the Secretary of State as regards matter covered by these sections. The resultant position was clearly this: (1) There was no further recruitment to a special covenanted service by the Secretary of State, (2) There was to be no statutory reservation of posts to be made by the Secretary of State. (3) The conditions of service as made by the Secretary of State no longer continued in operation. (4) No right of appeal or approach to the Secretary of State for redress of any personal grievances relating to such servants, or right of compensation, etc. for any adverse action to be determined by the Secretary of State, continued to subsist.

Some of the conditions of service previously governing these person were continued by Section 10 (2) of the Indian Independence Act and the adaptations made thereunder.

The ultimate responsibility for the framing and maintenance of the conditions of service was no longer with the Secretary of State. In respect of such of these civil servants whose services were retained by the new Dominion Government the service continued to be under the Crown (as shown by the adaptation of Section 240 Government of India Act). But this was only because in theory the new Government of India was still to be carried on in the name of His Majesty. This was no more than a symbol of the continued allegiance to the Crown. The substance of the matter, however, was that while previously the Secretary of State's service were under the Crown in the sense that the ultimate authority and responsibility for these services was in the British Parliament and the British Government, this responsibility and authority, completely vanished from and after 15-8-1947, as envisaged in the Viceroy's announcement of 30-4-1947, and as specifically affirmed by Section 7 (1) (a), Indian Independence Act.

Thus the essential structure of the Secretary of State's service was altered and the basic foundation of the contractual-cum-statutory tenure of the service disappeared. It follows that the contracts as well as the statutory protection attached thereto came to an automatic and legal termination as held by the Privy Council and the House of Lords in some-what analogous situations in *Reilly v. The King*,<sup>1</sup> and *Nokes v. Doncaster Amalgamated Collieries Ltd.*<sup>2</sup>

Taking these various provisions together, the Supreme Court in *State of Madra v. Rajagopalan*<sup>3</sup> held that the guarantee of the prior conditions of service and the previous statutory safeguards relating to the disciplinary action were now

1. 1934 AC 176.

2. 1940 AC 1014.

3. 1955 SC 817.

'confined' to such as 'continue' in service on and after the establishment of the Dominion to service under the Crown, *i. e.* of the Government of the Dominion or of a Province, as the case may be. Who the persons were who fell within the category of persons 'so continuing' is clearly indicated by implication in Art. 7 (1) India (Provisional Constitution) Order, 1947, which says that any person who immediately before the appointed day is holding any civil post under the Crown in connection with the affairs of the Governor-General or Governor-General in Council or of a Province, shall as from that day, be deemed to have been duly appointed to the corresponding post under the Crown in connection with the affairs of the Dominion of India, or, as the case may be, of the Province.

The continuance contemplated by Section 10 (2) (a) Indian Independence Act and by Section 240 (2) and Section 247 Government of India Act as adapted, is the continuance impliedly brought about by this deeming provision in Art. 7 (1) India (Provisional Constitution) Order. But it has to be noted that this provision in specifying preceded the by qualifying phrase "subject to any general or special orders or arrangements affecting his case." Thus all persons who were previously holding civil posts were deemed to have been appointed and hence to continue in service, excepting those whose case was governed by "general or special orders or arrangements affecting his case."

The special orders or arrangements contemplated therein, in so far as the members of the Secretary of State's service were concerned, were the special orders or arrangements which followed on the Viceroy's announcement dated 30-4-1947, in pursuance of the individual civil servants had been circularised and their wishes ascertained, and the Governments concerned had finally intimated their option not to invite the continuance of the service of particular individuals as had happened in that case of plaintiff in *State of Madras v. Rajagopalan*.<sup>1</sup>

### 1-13. *Lapse of Paramountcy of British Crown.*

The paramountcy of the British Crown was not co-extensive with the right of the Crown flowing from the Treaties. It was based on Treaties, Engagements, Sanads as supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State embodied in political practice. The rights that the Paramount power claimed in exercise of the functions of the Crown in relation to the State covered matters both external and internal.<sup>2</sup>

Section 7 of the Independence Act<sup>3</sup> provided the consequences of the setting up of the new Dominions. As from the 15th August, 1947, His Majesty's Government in the United Kingdom ceased to have any responsibility as respects the Government of any of the territories which immediately before that day were included in British India. The suzerainty of His Majesty over the Indian States lapsed and with it, all treaties, agreements in force as at the date of the passing of the Act between His Majesty and the Rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise and there lapsed also any treaties or agreements in force between His Majesty and any persons having

1. 1955 SC 817 (828).

2. *White Paper on States*, p. 22.

3. 10 and 11 Ges. 6, c. 30.

authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty grant, usage, sufferance or otherwise.

Notwithstanding the lapse of paramountcy it was provided in the Act that "effect shall as nearly as may be, continue to be given to the provisions of any agreements relating to customs, transit and communications, posts, and telegraphs or other like matters until the provisions in questions were denounced by the Rules of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand or were superseded by subsequent agreements. These agreements were kept alive by the stand still agreements between the respective states and the Dominion of India.<sup>1</sup>

Till the lapse of paramountcy, the Crown as represented by and operating through the political authorities provided the nexus between the Indian States and the Central and Provincial Governments. The pivot of this arrangement was the Viceroy, who as Crown Representative, represented to the Indian States the suzerainty of the British Crown while at the same time he was, in relation to British India, the head of the Government as Governor-General. The Indian Independence Act, 1947, released the States from all their obligations to the Crown. It was evident that if in consequence the Indian States became separate independent entities there would be a serious vacuum not only with regard to the political relationship between the Central Government and the States, but also in respect of the co-ordination of all-India policies in the economic and other fields. All that the Dominion Government inherited from the paramount power was the proviso to section 7 of the Indian Independence Act, which provided for the continuance, until denounced by either of the parties, of agreements between the Indian State and Central and Provincial Governments in regard to specified matters, such as Customs, Posts and Telegraphs, etc.<sup>2</sup>

Immediately afterwards, the India (Provisional Constitution) Order was promulgated. By this order sections 5 and 6 of the Government of India Act, 1935 were extensively amended setting up machinery for the Indian States to accede to the Dominion of India.

The plea for accession met with a favourable response. Negotiation for accession of States were soon completed and instruments of accession were executed by the heads of the Indian States. Simultaneously, Standstill agreements, the acceptance of which was made by the Government of India a condition of accession by the States concerned, were also entered into between the Dominion Government and the acceding States. The Standstill Agreements recited :

"Whereas it is to the benefit and advantage of the Dominion of India as well as of the Indian States that existing agreements and administrative arrangements in the matter of common concern, should continue for the time being between the Dominion of India or any part thereof and the Indian States :

Now therefore it is agreed between the State and the Dominion of India that :

1. *Indian Independence Act, Section 7 Proviso.*
2. *White Paper on States, p. 32, para 71.*



"1. (1) Until new agreements in this behalf are made, all agreements and administrative arrangements as to matters of common concern now existing between the Crown and any Indian State shall, in so far as may be appropriate, continue as between the Dominion of India, or, as the case may be the part thereof, and the State.

(2) In particular, and without derogation from the generality of sub-clause (1) of this clause the matters referred to above shall include the matters specified in the Schedule to this agreements.

(3) Nothing in this agreement includes the exercise of any paramountcy functions."<sup>1</sup>

#### 1.14. *Position of the Rulers of Indian States.*

By the instrument of accession the Princes were assured that the terms of the instrument will not be varied by any amendment of the Government of India Act, 1935, or the Indian Independence Act, 1947, unless such amendment be accepted by the Prince by a supplementary instrument; that nothing in the instrument shall be deemed to commit the Prince in any way to acceptance of any future Constitution of India or to fetter his discretion to enter into agreements with the Government of India under any such future Constitution, and that nothing in the instrument shall affect the continuance of the Princes' sovereignty in and over the State, or, save as provided by or under the instrument, the exercise of any powers, authority and rights enjoyed by the Prince as head of the State or the validity of any law in force in the State.<sup>2</sup>

It was followed by the next phase culminating in integration of some States in the Provinces, consolidation of other States into sizable administrative units, and some other States executing agreements integrating with the Dominion. The process of integration of States varied from State to State. 216 out of the States merged with the existing Provinces; 61 States were taken over as Centrally administered areas; and 275 States were integrated in five Unions of States, Saurashtra, Madhya Bharat, Rajasthan, Pepsu and Travancore-Cochin.<sup>3</sup>

The instruments of merger provided for the integration of States and for transfer of power from the Princes and guaranteed to the Princes the privy purse, succession to the Gaddi, rights and privileges, and full ownership, use and enjoyment of all private properties belonging to them as distinct from State properties. The covenants for establishing Unions of States and the agreements of merger contained provisions guaranteeing to the heads of merged States or integrated States payment of privy purses. These instruments were concurred in and guaranteed by the Government of the Dominion of India.<sup>4</sup>

The next phase was of assimilation and consolidation of the unity achieved till then. In the case of the "Provincially merged" and "Centrally administered" States, authority for exercising the powers of administration and legislation originally derived from the Extra-Provincial Jurisdiction Act, 1947, was later exercisable by virtue of orders issued under Section 290-A and

1. *Madhav Rao Scindia and others v. Union of India*, (1971) 1 SCC 85 (150).

2. *Ibid.*, p. 150.

3. *Ibid.*

4. *Ibid.*, p. 151.

290-B incorporated in the Government of India Act, 1935. By an order issued under Section 290-A diverse steps were taken for integration of the former State in the Provinces.<sup>1</sup>

To give constitutional sanction to the merger agreements, special provisions were expressly incorporated in the draft Constitution recognising the status of the Princes, the obligation to pay the privy purse, and the personal rights and privileges guaranteed to them. The territories of the State after integration retained no political or legal identity. Special recognition was given to the status of the Princes and to their rights and the obligations of the Unions, and for that purpose, Articles 366 (15), 366 (22), 291 and 362 were incorporated in the Constitution. In Article 366 (15) the expression "Indian State" was defined as meaning any territory which the Government of the Dominion of India recognised as such a State; and in Article 366 (22) a special definition of the expression "Ruler" was evolved for the purpose of the Constitution; by Article 291 the privy purse was charged on, and made payable out of, the Consolidated Fund of India, and the sum so paid as privy purse to the Ruler was declared exempt from all taxes on income. By Article 362 the Parliament, the State Legislatures and the executive of the Union and the States were enjoined to have "due regard to the guarantees and assurances" under the covenants and agreements between the Government of the Dominion of India and the heads of the former Indian States.<sup>2</sup>

After India attained political freedom in 1947 and before the Constitution was adopted the historical process of the merger and integration of the several Indian States with the rest of the country was speedily accomplished with the result that when the Constitution was first passed the territories of India consisted of Part A States which broadly stated represented the Provinces in British India, and Part B States which were made up of Indian States. This merger or intergration of Indian States with the Union of India was proceeded by the merger and consolidation of some of the states *inter se* between themselves.

### 1.15. *Indian States and the Constitution.*

The stage was then set for the promulgation of the Constitution. A few days before November 26, 1949, a large majority of the States proclaimed that the Constitution of India will be the Constitution for their respective territories, and shall be enforced as such in accordance with the provisions, and that the provisions of that Constitution shall, as from the date of its commencement, supersede and abrogate all other existing constitutional provisions inconsistent therewith. Merger agreements were executed to give effect to the proclamation. The proclamation and the execution of the merger agreements resulted in complete extinction of the States and Unions of States as separate units. The princes ceased to retain and vestige of sovereign rights or authority *qua* their former States. They acquired the status of citizens of India.<sup>3</sup>

Articles 291, 362 and Part VII of the Constitution were when incorporated intended to grant recognition to the solemn promises on the strength of which the former Princes were invited by those at the helm of affairs to join the experiment for achieving for the millions their dream of securing a truly

1. *Madhav Rao Scindia and others v. Union of India*, (1971) 1 SCC 85 (150).

2. *Ibid.*

3. *Ibid.*, pp. 151-52.

democratic form of Government in United independent India, and Clauses (15) and (22) of Article 366 were intended to serve the purpose of identifying the persons who remained entitled to the benefit of those constitutional guarantees.<sup>1</sup>

Article 366 (21) defined 'Rajpramukh'. By Article 291 payment of any sum free of tax guaranteed or assured under any covenant or agreement with a Ruler of an Indian State as privy purse, was charged on and was made payable out of the Consolidated Fund of India, and the sum so paid to any Ruler was exempt from all taxes on income.<sup>2</sup>

As a *quid pro quo* for agreeing to surrender their power and authority, it was enacted in the Constitution that the Princes who had signed the covenant of the nature specified will be recognized as Rulers. But under the treaties, covenants and agreements executed by the former Princes, there was no provision for recognition of Rulers. The President was invested by the Constitution with power to recognise Rulers under Article 366. (22). The status of the Rulers under the Constitution was not the status which the Princes had: their rights, privileges and functions were fundamentally different from those of the former Princes. Some degree of obscurity was introduced by the use of the expression "Ruler" and "Ruler of an Indian State" in the articles. But the meaning was reasonably plain. Ruler as defined in Article 366 (22) was a former Prince, Chief or other person who was on or after January 26, 1950, recognised as a Ruler, he having signed the covenant, or his successor. The Ruler of an Indian State meant a Prince, or Chief who was recognized before the Constitution by the British Crown. The Ruler of an Indian State had sovereign authority over his State. The Ruler recognized by the President ruled over no territory, and exercised no sovereignty over any subjects. He had no status of a potentate and no privileges which were normally exercised by a potentate. He was a citizen of India with certain privileges accorded to him because he or his predecessor had surrendered his territory, his powers and his sovereignty.<sup>3</sup>

### 1.16. Derecognition of Rulers.

On September 2, 1970, a Bill entitled the Constitution (Twenty-Fourth Amendment) Bill, 1970 and providing that "Articles 291 and 362 of the Constitution, and Clause (22) of Article 366, shall be omitted", was introduced in the Lok Sabha. The Bill was declared passed with the amendment that the provisions thereof shall come into operation with effect from October 15, 1970. On September 5, 1970, the motion for consideration of the Bill did not obtain, in the Rajya Sabha, the requisite majority of not less than two thirds members present and voting as required by Article 368 of the Constitution. The motion for introduction of the Bill was declared lost. A few hours thereafter, the President of India purporting to exercise powers under Clause (22) of Article 366 of the Constitution signed an instrument withdrawing recognition of all the Rulers.

On September 6, 1970 the President of India passed an order in respect of each of the Rulers of former Indian States, de-recognising them as rulers. These orders resulted in the forthwith stoppage of the Privy Purse received by the Rulers and the discontinuance of their personal privileges.<sup>4</sup>

1. *Madhav Rao Scindia and others v. Union of India*, (1971) 1 SCC 85 (153).

2. *Ibid.*, p. 155.

3. *Ibid.*, p. 163.

4. (1971) 1 SCC 85 (113).

This order was challenged before the Supreme Court in *Madhav Rao Scindia v. Union of India*;<sup>1</sup> and by a majority of ten to one the Supreme Court, declared the order made by the President to be illegal and on that account inoperative. In consequence a writ of mandamus was issued not to enforce the orders.

To nullify the effect of the Supreme Court decision the Constitution was amended in 1971 by the Constitution (Twenty-Sixth Amendment) Act, 1971. Articles 291 and 362 were omitted.

After Article 363 of the Constitution, another Article 363-A was added:

(a) The Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-Sixth Amendment) Act, 1971, was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler shall, on and from such commencement, cease to be recognised as such Ruler or the successor of such Ruler;

(b) On and from the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, privy purse is abolished and all rights, liabilities and obligations in respect of privy purse are extinguished and accordingly the Ruler or, as the case may be, the successor of such Ruler, referred to in Clause (a) or any other person shall not be paid any sum as privy purse."

Article 366 was also amended. For Clause (22) the following clause was substituted, namely:

"(2) "Ruler" means the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971 was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler."

1. *Madhav Rao Scindia v. Union of India*, (1971) 1 SCC 85.

## Constitutionalism

### SYNOPSIS

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#### 2.1. *Constitution making in different countries—American example.*

The American struggle to extend popular control ended in independence.

Thirteen colonies, mutually independent, having joined to destroy the common tie of subjection to the British Crown, but desiring still to perpetuate their union of race and common interest, faced the task of forming a central or union government in such fashion as to reconcile national unity with those ideas of the right of self-government which had been the cause of their separation from the British Empire.

“The Convention of 1787 was composed of very able men of the English-speaking race. They took the system of government with which they had been familiar, improved it, adapted it to the circumstances with which they had to deal, and put it into successful operation. It is needful, however, to remember in this connection that when the Convention was copying the English constitution that constitution was in a stage of transition, and had by no means fully

developed the features which are now recognized as most characteristic of it. The English constitution of that day had great many features which did not invite republican imitation. It was suspected, if not known, that the ministers who sat in Parliament were little more than tools of a ministry of Royal favorites, who were kept out of sight behind the strictest confidences of the King. It was notorious that the subservient parliaments of the day represented the estates and the money of the peers and the influence of the King, rather than the intelligence and purpose of the nation. It was something more than natural that the Convention of 1787 should desire to erect a Congress which would not be subservient, and an executive which could not be despotic; and it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end".<sup>1</sup>

Prof. Wilson, in his book<sup>2</sup> indeed, claims that Congress is now supreme over the executive of the federal government, and "subjects even the details of administration to the constant supervision, and all policy to the watchful intervention, of the Standing Committees of Congress". There was, however lack of executive responsibility to Congress. The President and the heads of the chief executive departments of government stood apart, isolated from Congress; bound to execute its laws, but with no greater influence in securing the passage of laws in aid of effective administration, or in preventing the passage of laws which might hamper administration, than was possessed by any other private citizen. By the terms of the Constitution itself they were debarred from seats in Congress, and so had no initiative in legislation. On the other hand, Congress must go to the full extent of law-making in order to exercise its supremacy over the executive. But the trouble may not in the Act itself, but in its execution: no matter to what extent of detail an Act may make provision, an executive completely out of sympathy with the law would not be a very satisfactory administrator of it. In short, there is no guarantee of that harmony between the legislative and executive departments, that sympathy and co-operation without which there must necessarily arise constant friction, lack of continuity in policy, and even a deadlock in the administration of public affairs. Congress and the executive are responsible, each directly to the people; but the retention of the confidence of Congress is in no way a condition to the retention of office. Congress had no such power to depose the executive as has the House of Commons in the British constitutional system. Moreover, the constant possibility of party diversity between the Executive and Congress render it very difficult to fasten responsibility upon either. This difficulty is thus strongly put by Prof. Wilson :

"Is Congress rated for corrupt, or imperfect, or foolish legislation ? Does administration blunder and run itself into all sorts of straits ? The Secretaries hasten to plead the unreasonable or unwise commands of Congress, and Congress falls to blaming the Secretaries. The Secretaries aver that the whole mischief might have been avoided if they had only been allowed to suggest the proper measures; and the men who framed the existing measures, in their turn, avow their 'despair of good government so long as they must entrust all their plans to the bungling incompetence of men who are appointed by, and responsible to, somebody else. How is the school-master, the nation, to know which boy needs the whipping?'"<sup>3</sup>

1. Prof. Woodrow Wilson: *Congressional Government*, 4th Edn., p. 307...Wilson later became President of the United States.

2. *Ibid.*

3. *Ibid.*, p. 283.

In the preface to the same work, the distinction between the British and the American systems of government is thus shortly stated :

“It is our legislative and administrative machinery which makes our government essentially different from all other great governmental systems. The most striking contrast in modern politics is not between Presidential and Monarchical governments, but between Congressional and Parliamentary governments. Congressional government is *Committee* government; Parliamentary government is government by a responsible *Cabinet Ministry*. These are the two principal types which present themselves for the instruction of the modern student of the practical in politics; administration by semi-independent executive agents who obey the dictation of a legislature to which they are not responsible; and administration by executive agents who are the accredited leaders and accountable servants of a legislature virtually supreme in all things.”

## 2.2. Colonial Governments and Dominions (Canada).

The early colonial governments acquired their importance for the most part after the American revolution when England began to rebuild its shattered Empire.

All the colonies, it is true, had representative government through the elected Legislative Assembly, but the latter's control in any real sense was frustrated by other elements in the government which held no popular mandate whatever. Even the legislative power was shared by the Assembly with an appointed Legislative Council, but this was of small importance when compared to the exclusive executive authority wielded by the Governor and the Executive Council, the members of which he appointed. The attacks of the reformers went to the centre of these difficulties, and they demanded the right to control the advisers of the governor. Let the governor call to his Executive Council those who have the confidence of the Assembly, and let these advisers be changed whenever the Assembly indicated that it wished a change to be made, and at one stroke the friction and quarrelling between the executive and the legislature would disappear. *Representative* government would then be transformed into *responsible* government.<sup>1</sup> The solution had been discovered in England many years before, although certain implications of the general principle were still being worked out by empirical methods. But the colonial situation presented one important difference. If this innovation took place, how would the Governor be able to follow the advice of a Council responsible to the Assembly, and at the same time obey instructions from London? How could he serve two masters with no assurance or even likelihood that they would agree?

There was no doubt that the great majority of the founders of the Dominion were anxious to maintain the British connection and the British stamp upon their political institutions. The preamble to the British North America Act was therefore stating the simple truth when it proclaimed that the people of the province desired “a Constitution similar in Principle to that of the United Kingdom.”<sup>2</sup>

The outstanding exception to the general rule of British influence was, of course, the part of the Act dealing with the federal distribution of power. Here, the experience of the United States worked both to encourage and to

1. Dawson: *Government of Canada*, pp. 13, 14 1949 Ed.

2. *Ibid.*, p. 46.

dissuade. "It was the fashion" said Macdonald in 1865, "to enlarge on the defects of the Constitution of the United States, but I am not one of those who look upon it as a failure. I think and believe that it is one of the most skilful works which human intelligence ever created; it is one of the most perfect organizations that ever governed a free people. To say that it has some defects is but to say that it is not the work of Omniscience, but of human intellects." The American example, as this passage indicates, undoubtedly served as a constant inspiration which encouraged the British North American colonies to seek their solution in some form of federalism; but in determining the balance of authority between the federation and the provinces, the allotment of subjects, and the location of the residual power, they endeavoured to interpret American experience and profit by American mistakes. The same attitude is evident in other matters as well; indeed, on most questions there is a fairly strong bias against American practices.<sup>1</sup>

Federalism came in by way of exception to the established, operating machinery of parliamentary government. The presidential system of the United States found no supporters, even among those and there were several who were loud in their praises of the American constitution. A great evil in the United States, it was said was that the President was a despot for four years. Every President was the leader of a party, and obliged to protect the rights of a majority. Under the British Constitution, with the people having always the power in their own hands and with the responsibility of a Ministry to Parliament, they were free from such despotism.

The Canadians, however, made their choice on the basis of their experience and their observation, and their constitution in this respect remained more British than American. Parliament, in the British tradition of 1867, was composed of the Crown and the representatives of the people in two houses. The business of Parliament was conducted by a government, or group of ministers of the Crown made up of leaders of the dominant party in the lower House, acting under a Prime Minister. These advised the Crown upon the exercise of all its legal powers and assumed responsibility for all its public actions. The Crown was fully controlled by the law and the custom of the constitution. With the idea of Parliamentary Government went the basic ideas of election and franchise, of freedom of public discussion, of Government by consent of the governed, in short, of a political democracy.\*

England's great contribution had been parliamentary and responsible Government; the United States had shown that federalism was the system best adapted to a disunited people scattered over wide areas. Canada was the first nation to weld these conceptions into a new whole, and in so doing she produced a constitution which, it was agreed, embodied the virtues of both its prototypes. But virtues, particularly borrowed virtues, are more easily adopted than retained.<sup>4</sup>

In federalism established by the under the British North America Act, 1867 the true line of division is this: The various subject matters with which Government may have to deal are divided into two great divisions—matters of general and matters of local concern—but to each of such divisions the full equipment of power, legislative and executive, is given. The

1. Dawson : *Government of Canada*, pp. 47-48.

2. Frank R. Scott: *Essays on the Constitution*, p. 26.

3. *Ibid.*, p. 27.

4. *Ibid* p. 35.



Dominion government and the Provincial governments are carried on (each within the sphere of its legitimate operation) on the same principle as is the government of the United Kingdom. Jurisdiction as to subject matter conceded, the will of the legislature, Dominion or Provincial, is supreme over the executive in the same sense as the will of the Imperial Parliament is supreme over the executive in the United Kingdom.<sup>1</sup>

The elective branch of the legislature (Dominion Parliament or Provincial Legislative Assembly) represents, and is directly responsible to, the electorate—as in the United Kingdom. The Executive Committee (the cabinet), composed of members of the legislature, hold their positions by virtue of, and contingently upon, the retention of the confidence of the elective branch of that Legislature and are, therefore, practically directly responsible to that elective branch as in the United Kingdom.<sup>2</sup>

## 2.2. *Australian constitution.*

The first steps towards a federation of the Australian colonies were taken as far back as 1849, at a time when discussions were taking place on the granting of responsible Government to them. The Commonwealth of Australia was proclaimed to come into existence on 1st January, 1901, the proclamation being issued on 17th September, 1900.

The monarchical principle was recognized in a number of sections of the Constitution. The Queen was at the apex of the legislative structure (s. 1). She was also the Chief Executive (s. 61). In both cases, however, her powers were exercisable by the Governor-General (ss. 2, 61). Consequently, in respect of the duties associated with the governmental structure, the Governor-General, acting on the advice of the Executive Council in most cases (see ss. 62, 64) was the repository of federal executive authority.

There were other connections between the Commonwealth and the United Kingdom. It was recognized in 1900, although not without some doubts, that the Commonwealth of Australia—the Union of federated States would still continue to have the status of a “self-governing” colony although proposals to incorporate this status formally in the covering clauses were not proceeded with.<sup>3</sup> The consequence of this status was to subject the Commonwealth Parliament to the provisions of the Colonial Laws Validity Act and, therefore, to the paramountcy of Imperial legislation. This “colonial” status was also embodied in the doctrine of extra-territorial legislative incompetence which affected the interpretation of Commonwealth power in the early cases.<sup>4</sup>

The federal nature of the Constitution was proclaimed in the first paragraph of the preamble which referred to the agreement on the part of the people of the colonies to unite in “one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.”

## 2.3. *Dominion State—Statute of West Minster, 1931—India denied Dominion Status.*

From that time on, issue after issue persistently emphasized the determination of most of the Dominions to be their own masters, even though

1. *Clemant's Canadian Constitution*, 3rd Edn. p. 345.

2. *Ibid.*, p. 346.

3. *Quick and Garran: Annotated Constitution*, 1900 Ed., p. 347-52.

4. *Ibid.*, 1981 3rd Edn. p. 33.

such a policy necessarily involved the abandonment of the diplomatic unity of the Empire.

Several Dominions brought the matter to an explicit decision at the Imperial Conference of 1926. This Conference issued a formal statement proclaiming the Dominions, an equality which was manifest not only in international affairs but also within the Empire. The British Commonwealth was to remain united under a common King; and subordination, either in law or in practice, was to give way to association and co-operation among autonomous partners.

The concerns of Canada, Australia and other dominions led to the imperial conferences (Conferences of the Prime Ministers of the Self Governing Dominions) of 1926 and 1930 which grappled with the task of removing vestiges of colonial status from the Dominions.

A report was submitted in 1929. The Imperial Conference of 1930 concurred in this report, and formally requested that the recommendations there made should be enacted by the British Parliament. In response to this request the British Parliament passed the Statute of Westminster in 1931.

Their position and mutual relation (*i. e.* of Great Britain and the Dominions) may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

It was an essential consequence of the equality of status that the Governor-General of a Dominion was the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as was held by His Majesty the King in Great Britain, and that he was not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

The British Parliament refused to grant 'Dominion Status' to India. The Report of the Joint Committee on Indian Constituent Reforms reads :

"If the Constitutions of Canada, Australia, New Zealand and South Africa were framed on the British model, it was not because Parliament decided on theoretical grounds to reproduce that model in those countries, but because Government in those countries had been long conducted on British principles and had already grown into general conformity with British practice. If these Constitutions, enacted over a period of more than forty years, differ from one another in certain points, those differences are not to be attributed to changes in British constitutional theory, so much as to variations in the experience and practice of the particular communities themselves. In India, too, there is already a system of Government which, while possessing many special characteristics, is no less based on British principles, and is no less a living organism. Already, long before either the Morley-Minto or the Montagu-Chelmsford reforms, that Government had shown a marked tendency to develop on certain lines. The safest hypothesis on which we can proceed, and the one most in accordance with our constitutional history, is that the future Government of India will be successful in proportion as it represents, not a new creation substituted for an old one, but the natural evolution of an existing Government and the natural extension of its past tendencies."

On the basis of this Report the Parliament enacted the Government of India Act, 1935.

#### 2.4. *Position after the Second World War, 1945.*

Since World War II, no fewer than 500,000,000 people in the under developed areas had achieved independence; their world and ours was in ferment. After hundreds of years of silent suffering they decided to attain for themselves a few of the values of modern society, the fruits of the equal opportunities and the full rights of man as set forth in the United Nations Universal Declaration of 1948. They had achieved political independence; they were free to choose to turn to the right or to the left. Most of them chose in favour of democracy. But for how long? That was the burning question that confronted every nation in the free world. How long could political democracy in the underdeveloped areas last without the economic under-pinnings which a true democracy required before it could function?<sup>1</sup>

Since the Second World War, constitutionalism in Europe had served the goal of giving expression to what had been called the "negative revolutions" in France, Italy, and Germany. By these revolutions, a defunct and generally rejected totalitarian fascist past had been negated and replaced by a more or less conventional constitutional order. The constitutions of the French Fourth Republic, of the Italian Republic, and of the Federal Republic of Germany closely resembled the order which existed prior to the seizure of power by Mussolini, Hitler, and the Petain-Laval group.

The new states of Asia and Africa with few exceptions adopted some form of parliamentary democracy upon their establishment as independent states. With local variations, they modelled their constitutions on those of the older democracies and they established electoral procedures, parliamentary institutions and administrative structures designed to put these principle into effect. In so doing they encountered formidable problems of government, intensified by their basic problems of economic and social development. One after another they found that the system which they had adopted was not working effectively; several, with the conspicuous exception of India, suspended or abrogated features of their original constitutions, generally under the leadership of the military, in an effort to evolve new forms suited to their experience and needs.<sup>2</sup>

In these countries neither a republican form of government nor democratic institutions based on elected representatives had a genuine local tradition behind them. In most cases, both the experience and the psychological background for putting such institutions into operation were lacking; the full implications of the parliamentary system, with cabinets, legislative bodies and the other paraphernalia, were imperfectly understood not all only among the masses of the people but often by the leaders themselves.

The central problem which they faced was the problem of obedience. The authority of the monarch or his deputy had been well understood; it had been in fact virtually axiomatic. The monarch had been hedged about with majesty; in the formula with which the emperors of China had ended their

1. Trygve Lie's: *In the cause of Peace*, p. 441-42.

2. *History of Mankind*, Vol. 6, p. 806.

orders, the populace was expected to 'tremble and obey'. But authority in a democracy, the will of the people, or more particularly the will of the majority as expressed through parliament, was not clearly understood and accepted; obedience to the majority was far from axiomatic. Occasional or chronic rebellion, seizure of power by non-constitutional means, dismissal of parliamentary bodies or cabinets by Governor or President to override majority action in one after another of the new states during the first decade of their existence, were evidence that the principle of democratic obedience had yet to become a working basis for many of the new states. The problem presented itself in acute form in the issue of the supremacy of civil authority over the armed forces. The supremacy of civil over military authority in a democracy depends on a widespread and ingrained democratic spirit among the people. Even in many old and well-established democratic states, the military had at one time or another in their history challenged civil authority; where democratic institutions had functioned imperfectly it had offered a chronic threat. In the new states whose people were long used to accepting authority based on effective power, the threat was very much present and the danger to the survival of democratic institutions was great.<sup>1</sup>

By the period after the Second World War the unity of mankind had also become one of the leading ideas of the time and this idea was a motivating force in many of the more significant activities of the twentieth century; the effort to raise the economic, cultural and physical standards of backward and weaker section of the society; acknowledgment in principle of a general level of rights and privileges for all, as expressed in the United Nation Universal Declaration of Human Rights. Though no one could claim that all people had achieved equality of opportunity, the striking fact of the twentieth century in comparison with previous ages of history was the world wide commitment to the principle.<sup>2</sup>

## 2.5. Importance and Emphasis placed on Economic and Social values— Position of women and Human rights.

The twentieth century was further especially notable for the emphasis it placed on economic and social values as against the 'purely individual and primarily political values which found their apogee in western society in the nineteenth century. By the opening of the century challenges were coming from a number of quarters to *laissez faire* individualism and its assumptions that the function of government was to assure the individual his natural and inalienable right to be free, that economic prosperity would result from individual effort and that social welfare should be left to the conscience of individuals. A growing body of opinion saw the untrammelled freedom of the individual as a form of social anarchy leading to the oppression of the weak by the strong and exploitation of the poor by the rich; it held that the freedom of the individual could have meaning for people as a whole only when they enjoyed a measure of economic security and effective social safeguards. From the mid-nineteenth century the doctrine of socialism emphasized the importance of collective rather than individual values. The trade union movement substituted collective action for the idea of a free market where the worker could sell and the employer could buy labour according to the law of supply and demand.<sup>3</sup>

1. *History of Mankind* Vol. 6, p. 806-807.

2. *Ibid.*

3. *Ibid.*, p. 653.

The Indian government after independence faced the double economic task of reorienting a colonial economy to domestic needs and developing a more productive economy which could lift the Indian people from extreme poverty to a level of living closer to that of more prosperous and developed countries.

Indian society was one of the most complexly stratified in the world by reason of its elaborate caste system, which provided in some instances a basis for hereditary occupations.

European liberalism was rooted in the idea of human nature which had been part of European thought from the time of the Renaissance, and especially from the period of the Enlightenment that man is rational, responsible and capable of exercising control over his own affairs. In this view the fullest development of the individual is the aim of society; it is also the means of achieving that aim and the measure of success. The individual is endowed with essential and inherent rights which must be protected and respected. These rights were historically defined in terms of freedom—freedom to enjoy life, liberty and property except as restrained by due process of law, freedom of association, freedom of thought, speech and religion. The history of mankind was seen in terms of the progressive emancipation, of the human spirit from ignorance superstition and authority and from submergence of the individual in the group. The classic statements of rights and freedoms which expressed basic liberal principles had been contained in the British Bill of Rights, the American Declaration of Independence and the Bill of Rights of the American Constitution, and the French Declaration of the Rights of Man and of the Citizen. Restated by President Woodrow Wilson as the war aims of the Allies in the first world war, the principles were essentially unchanged, and enjoyed high prestige at victory; they were embodied in the political institutions of the successor states in eastern Europe and in the German Weimar republic. When a President of the United States again formulated the aims of the liberal democracies aligned in war, the formulation had changed. The 'four essential human freedoms' enumerated by President Franklin Roosevelt included a new freedom, 'freedom from want'. This was the formulation, with its implication of economic measures on behalf of all the people, that was adopted by the new states which emerged after the second world war, when victory had again raised the prestige of liberal democracy. And these were the terms in which the United Nations Charter declared its purpose 'to promote social progress and better standards of life in larger freedom' and the Universal Declaration of Human Rights defined the rights of 'all human beings'.<sup>1</sup>

While nations and people sought to realize their aspirations as total societies, elements in the population aspired to change their condition and status. Workers, peasants, women and members of minority groups sought to attain the status and opportunities promised for all people by the principle of the Declaration of the Rights of Man, but enjoyed only by the more favoured elements. Their drive was for individual freedom and human dignity, self-respect and the respect of others, first-class citizenship and full participation in the life of their societies. Labours drive for recognition, status and welfare was the most potent and wide spread of these efforts. By the opening of the century "labour" was well established as a self-conscious entity in industrial society.<sup>2</sup>

1. *History of Mankind*, pp. 995-996.

2. *Ibid.*, p. 1110.

In the twentieth century increasing numbers of women throughout the world aspired to a new status and a new life. The status which they sought was one of personal identity as individuals; the new life was one of full opportunity. They wished to share the rights enjoyed by men and to be able to take part in the same political activity, receive the same education, engage in the same professions or other types of work, and be governed by the same code of social behaviour. But they wished, too, for the opportunity to give full expression to their differences without the implication of inferiority. Such aspiration were generally voiced by educated women; it was not always clear that they were wholly shared by others. They were achieved in large measure during the first half of the century by the women of the industrialized countries but were only beginning to be realized at mid-century by most women elsewhere.<sup>1</sup>

The Charter of the United Nation affirmed faith in the 'equal rights of men and women' and declared among its purposes the encouragement of respect for human rights without distinction of race, sex, language or religion. The Universal Declaration of Human Rights formulated a clear vision of women's status in the kind of society which the declaration implied, declaring that men and women.....are entitled to equal rights as to marriage, during marriage, and at its dissolution', that 'everyone' has the right to 'free choice of employment' and 'without any discrimination, has the right to equal pay for equal work', the 'right to education' with higher education 'equally accessible to all on the basis of merit', the 'right to take part in government' and 'freely to participate in the cultural life of the community'.

The drive for individual freedom and human dignity in the twentieth century involved groups in many countries who were the object of discrimination because of race, caste or other social disability and who were frequently accorded less than the full privilege of citizenship. Unlike other minorities who desired cultural autonomy within multi-cultural societies, members of these groups sought the removal of social stigma and legal restrictions which stood in the way of individual and group acceptance and advancement.<sup>2</sup>

Untouchables of India were the product of a long history of migration by the warring peoples in the Indian sub-continent, for whom the Hindu caste system had provided a mechanism for establishing and perpetuating superior-inferior relationships; they had been assigned the most unpleasant work, and the disabilities to which they were subjected were a means of ensuring that tasks necessary to the life of the villages would be performed.<sup>3</sup> Among the largest groups subject to the most extreme forms of discrimination were India's untouchables, who numbered 50,000,000 according to the census of 1931. These classes were segregated, denied elementary civil rights and confined to occupations like scavenging which were considered unclean. They were present in all parts of India, for every village and town depended on them to do the necessary tasks which no other Hindu would perform; they in turn were wholly dependent, for they could not even draw water from the village well and must wait for their water jars to be filled by others.<sup>4</sup>

1. *History of Mankind*, p. 1143-44.

2. *Ibid.*, p. 11 63.

3. *Ibid.*

4. *Ibid.*, p. 1181.

In our country there were elements of unity but there were some elements of diversity also. A number of languages and dialects, are spoken in India. There were at least five important religions viz., Hinduism, Islam, Christianity, Buddhism, Jainism and Sikhism. The Muslim and Hindu population of India were partially separated from each other by the establishment of Pakistan and the consequent migration from Pakistan of some six million Hindus and a roughly corresponding number of Muslims from Hindustan to Pakistan. Nearly forty million Muslims remained in India.

After Independence the country was divided into what was known earlier as British India and about five hundred princely states formerly known as Native States.

## 2-6. *Objectives before the Constituent Assembly.*

Under the Indian Independence Act the British Paramountcy lapsed and all these states became independent. They had a choice to join either of the two Dominions or to remain as independent units.

The broad tradition of constitutionalism had in this century been projected into the world plan. The Covenant of the League of Nations and the Charter of the United Nations were both embodiments of this international constitutionalism. Quite in keeping with the constitutionalist tradition, a Universal Declaration of Human Rights was adopted after vigorous debate by the United Nations in December 1948.

To most of us, the fashioning of a constitution for their political order has been significant as a symbol of our newly won freedom. It may be said that our constitution is of extraordinary complexity and formal sophistication, but it should never be forgotten that the task of organizing a whole culture of continental dimensions presented problems never before solved by western Constitutionalism. Working with European and American precedents, India had to find totally new provisions.

These were the various problems which faced the Constituent Assembly which had been elected between July-August 1946 as a result of the suggestion contained in the statement of the Cabinet Mission.

The first meeting of the Constituent Assembly took place on December 9, 1946. On December 13, Sri Jawahar Lal Nehru moved the "objective Resolution" on the Assembly's aim in the following terms.<sup>1</sup>

"(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent, Sovereign, Republic and to draw up for her future governance a Constitution;

(2) wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the states as well as such other territories as are willing to be constituted into the independent Sovereign India, shall be a Union of them all; and

(3) Wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration,

1. *Constituent Assembly Debates*, Vol. 1, p. 59.

save and except such powers and functions as are vested in or assigned to the Union or as are inherent or implied in the Union or resulting therefrom; and

(4) Wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilized nations ; and

(8) This ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

He further said :

"But even now, at this stage, it is surely desirable that we should give some indication to ourselves, to those who look to this Assembly, to those millions in this country who are looking up to us and to the world at large, as to what we may do, what we seek to achieve, whether we are going. It is with this purpose that I have placed this Resolution before this House. It is a resolution and yet, it is something much more than a resolution. It is a Declaration. It is a firm resolve. It is a pledge and an undertaking and it is for all of us I hope a dedication."

The travail of partition notwithstanding, the great moment arrived—the birth of free India at midnight on August 14-15, 1947.

Pandit Nehru in a remarkable speech said : "Freedom and power bring responsibility. That responsibility rests upon this Assembly, a sovereign body representing the sovereign people of India. Before the birth of freedom we have endured all the pains of labour and our hearts are heavy with the memory of this sorrow. Some of those pains continue even now. Nevertheless, the past is over and it is the future that beckons to us now. That future is not one of ease or resting but of incessant striving so that we might fulfil the pledges we have so often taken and the one we shall take today. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us; but as long as there are tears and suffering, so long our work will not be over. And so we have to labour and to work hard to give reality to our dreams. Those dreams are for India but they are also for the world, for all the nations and peoples are too closely knit together today for any one of them to imagine that it can live apart. Peace has been said to be indivisible; so is freedom, so is prosperity now, and



so also is disaster in this one world that can no longer be split into isolated fragments. To the people of India, whose representatives we are, we make appeal to join us with faith and confidence in this great adventure. This is no time for petty and destructive criticism, no time for illwill or blaming others. We have to build the noble mansion of free India where all her children may dwell.”<sup>1</sup>

On this memorable occasion Dr. Radhakrishnan said : “Our opportunities are great but let me warn you that when power outstrips ability, we will fall on evil days. We should develop competence and ability which would help us to utilise the opportunities which are now open to us. From tomorrow morning—from midnight today—we cannot throw the blame on the Britisher. We have to assume the responsibility ourselves for what we do. A free India will be judged by the way in which it will serve the interests of the common man in the matter of food, clothing, shelter and the social services. Unless we destroy corruption in high places, root out every trace of nepotism, love of power, profiteering and blackmarketing which have spoiled the good name of this great country in recent times, we will not be able to raise the standards of efficiency in administration as well as in the production and distribution of the necessary goods of life.

Pandit Jawaharlal Nehru has referred to the great contribution which this country will make to the promotion of world peace and the welfare of mankind. The *Chakra*, the Ashokan Wheel, which is there in the flag, embodies for us a great idea. Ashoka, the greatest of our emperors—look at the words of H. G. Wells regarding him, ‘Highnesses, Magnificences, Excellencies, Serenities, Majesties—among them all, he shines, alone, a star—Ashoka the greatest of all monarchs.’ He cut into rock his message of the healing of discords. If there are differences, the way in which you can solve them is by promoting concord. Concord is the only way by which we can get rid of differences. There is no other method which is open to us:—

“Samavaya Eva Sadhuh”

## 2.7. *Objection to the Draft Constitution.*

The Constituent Assembly took three years to complete its work, but when we consider the work that had been accomplished and the number of days that were spent in framing the Constitution there is no reason to be sorry for the time spent. There were not less than 7635 amendments of which 2473 amendments were moved. It was not only the members of the Drafting committee who were giving their close attention to the Constitution, but other members were also vigilant and scrutinising the Draft in all its details. “No wonder” said Dr. Ramendra Prasad, “that we had to consider not only each Article in the Draft but practically every sentence and some times every word in every Article. By the time the Draft Constitution was passed it had come to have 395 Articles and 8 Schedules. I do not attach much importance to the complaint which is some times made that it has become too bulky. If the provisions have been well thought out, the bulk need not disturb the equanimity of our mind.”<sup>2</sup>

Remembering that there is nothing in this world or can be perfect or please all and also the patent facts that the area to be covered was tremen-

1. *Constituent Assembly Debates*, Vol. 5, p. 4.

2. *Constituent Assembly Debates*, Vol. 10, p. 987.

dous, the population multitudinous of hundred of millions with multiplicity of languages and conflicts of vast and varied interests, it is not at all surprising that there are several problems involved. But it is marvellous that so much unity and integrity should have been evolved in almost all matters reflecting surely the highest credit on the good sense of the Assembly.

Dr. Ambedkar put the motion: "That the Constitution as settled by the Assembly be passed" and the motion was adopted on 26th November, 1949.

Our Constitution is no exception to the rule that every thing which has power to win the obedience and respect of man must have its roots deep in the past. About the American Constitution Bryce said that "there was little in the constitution that was absolutely new. There was much that was as old as Magna Charta."<sup>1</sup> The men of American Convention had the experience of the English Constitution and we had the experience of the Government of India Act, 1935 and the previous Government of India Acts of 1919 and 1915, these Acts had been drafted by British Constitutional Lawyers and they imported the parliamentary system of England.

It is sometimes said, that there is nothing new in the Constitution, that about half of it has been copied from the Government of India Act of 1935 and that the rest of it has been borrowed from the constitutions of other countries. Very little of it can claim originality. In this connection Dr. Ambedkar said:<sup>2</sup>

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly what are the fundamentals of a Constitution are recognized all over the world. Given these facts, all constitutions in their main provisions must look similar. The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country. The charge of producing a blind copy of the Constitutions of other countries is based, I am sure, on an inadequate study of the Constitution. I have shown what is new in the Draft Constitution and I am sure that those who have studied other Constitutions and who are prepared to consider the matter dispassionately will agree that the drafting Committee in performing its duty has not been guilty of such blind and slavish imitation as it is represented to be."<sup>3</sup>

As to the accusation that the draft Constitution had produced a good part of the provisions of the Government of India Act, 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. No body holds any patent rights in the fundamental ideas of a Constitution. I agree that administrative details should have no place in the Constitution. While every body recognised the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution there are two things interconnected with it. One is that the form of administration has a close connection with the form of the constitution. The form of the administration must

1. Bryce: *American Commonwealth*, Vol. 1, p. 28.

2. *Constituent Assembly Debates*, Vol. 7, p. 37.

3. *Constituent Assembly Debates*, Vol. 7, p. 37-38.

be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic. In these circumstances it is wiser not to trust the Legislature to prescribe forms of administration. This is the justification for incorporating them in the Constitution.<sup>1</sup>

The members of the Constituent Assembly were not so chauvinistic as to reject the experience of other nations. Yet although the Assembly borrowed freely, it fashioned from this mass of precedent a document to suit Indians' needs.<sup>2</sup>

So long as the borrowing have been adopted to India's peculiar circumstances, they can not in themselves constitute a defect, most modern Constitutions do make full use of the experience of other countries, borrow whatever is good from them and reject whatever is unsuitable. To profit from the experience of other countries or from the past experience of our own is the path of wisdom. There is another advantage in borrowing not only the substance but even the language of established Constitutions; for we obtain in this way the benefit of interpretation put upon the borrowed provisions by the Court's of their origin and we thus avoid ambiguity or doubts. Many of the articles of Constitution, either in wording or in content, have their origins in foreign Constitutions.

To balance a large state or society, whether monarchical or republican, on general laws is a work of so great difficulty that no human genius however comprehensive, is able by reason and reflection to effect it. The judgments of many must unite in the work, experience must guide their labour, and time must bring it to perfection.

What Story said about the American Constitution can very well be said about our Constitution. He said: "Let the American youth never forget, that they possess (in their Constitution) a noble inheritance, bought by the toils and sufferings, and blood of their ancestors; and capable, if wisely improved, and faithfully guarded, of transmitting to their latest posterity, all the substantial blessings of life, the peaceful enjoyment, of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful, as well, as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. \*It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers the People. Republics are created—These are the words which I commend to you for your consideration—by the virtue, public spirit and intelligence of the citizens. They fall, when the wise are banished from the public councils because they

1. *Constituent Assembly Debates* Vol. 7 p. 38.

2. Austin: *The Indian Constitution*, p. 13.

dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them.”<sup>1</sup>

No other constitution in the world is like ours. No other constitution combines under its wings such diverse peoples, numbering now more than 550 millions, with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems.<sup>2</sup>

“Every body who knows any thing” said John Morley,<sup>3</sup> “knows that it is a waste of our short lives to insist on ideal perfection. Popular government, or any other for that matter, is no chronometer, with delicate apparatus of spring wheels, balances, and escapements. It is a rough heavy bulk of machinery, that we must go to work as best we can. It goes by rude forces and weight of needs, greedy interests and stubborn prejudices, it can not be adjusted in an instant or it may be a generation, to spin and weave, new material into a well finished cloth.”

## 2.8. *Our Constitution—a resume.*

However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the state depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave : will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them ? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play.<sup>4</sup>

Let us now see in brief the outline of the constitution framed by the Constituent Assembly. It begins with an inspiring and nobly expressed preamble. It records the solemn resolve of the people of India to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and, amongst other things, to secure to all its citizens JUSTICE, LIBERTY and EQUALITY and to promote among them all FRATERNITY assuring the dignity of the individual and the unity of the Nation. One of the most cherished objects of our Constitution is, thus, to, secure to all its citizens the liberty of thought, expression, belief faith and worship. Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship. To implement and fortify these supreme purposes set forth in the preamble, Part III of our Constitution has provided for us certain fundamental rights. Article 14, which is one of the articles referred to in two of the questions, guarantees to every person, citizen or otherwise, equal protection of the laws within the territory of India. Article 16 ensures equality of opportunity for all citizens in

1. Story : *Commentary on the Constitution of the United States*.

2. *Keshavanand Bharati v. State of Kerala*, (1973) 4 SCC 225 (306). para 14.

3. *Notes on Politics and History*, p. 197.

4. *Constituent Assembly Debates*, Vol. 10, p. 975.

matters relating to employment or appointment to any office under the State. In order to avail themselves of the benefit of this Article all citizens will presumably have to have equal opportunity for acquiring the qualifications, educational or otherwise, necessary for such employment or appointment. Article 19 (1) guarantees to citizens the right, amongst others, to freedom of speech and expression sub-cl. (a) and to practice any profession, or to carry on any occupation, trade or business [(sub-cl.g.).] These rights are, however, subject to social control permitted by cls. (2) and (6) of Art. 19. Under Art. 25 all persons are equally entitled, subject to public order, morality and health and to the other provisions of Part III, to freedom of conscience and the right freely to profess, practise and propagate religion. Article 26 confers the fundamental right to every religious denomination or any section thereof, subject to public order, morality and health, to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion; to acquire property and to administer such property in accordance with law. The ideal being to constitute India into a secular State, no religious instruction is, under Art. 28 (1), to be provided in any educational institution wholly maintained out of State funds and under cl. (3) of the same Article no person attending any educational institution, recognised by the state or receiving aid out of State funds is to be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto. Article 29 (1) confers on any section of the citizens having a distinct language, script or culture of its own to have the right of conserving the same. Clause (2) of that Article provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Article 30, cl. (1) of which is the subject-matter of question of this reference, runs as follows :

“30 (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”

While our fundamental rights are guaranteed by Part III of the Constitution, Part IV of it, on the other hand, lays down certain directive principles of State policy. The provisions contained in that part are not enforceable by any Court, but the principle therein laid down are, nevertheless, fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Article 39 enjoins the State to direct its policy towards securing, amongst other things, that the citizens, men and women, equally, have the right to an adequate means of livelihood. Article 41 requires the State, within the limits of its economic capacity and development, to make effective provision for securing the right, *inter alia*, to education. Under Art. 45 the State must endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years. Article 46 requires the State to promote with special care the education and economic interests of the weaker sections of the people, and, in

particular, of the Scheduled Castes and the Scheduled Tribes, and to protect them from social injustice and all forms of exploitation.<sup>1</sup>

Part XVI of our Constitution also makes certain special provisions relating to certain classes. Thus Art. 330 provides for the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. Article 331 provides for the representation of the Anglo-Indian community in the House of the People. Reservation are made, by Arts. 332 and 333, for the representation for the Scheduled Castes and Scheduled Tribes and the Anglo-Indians in the Legislative Assembly of every State for ten years after which, according to Art. 334, these special provisions are to cease. Special provision is also made by Art. 336 for the Anglo-Indian community in the matter of appointment to certain services. Article 337 has an important bearing on the question before us. It provides that during the first three financial years after the commencement of this constitution, the same grants, if any, shall be made by the Union and by each State for the benefit of the Anglo-Indian community in respect of education as were made in the financial years ending on the thirty first day of March, 1948 and that during every succeeding period of three years this grant may be less by ten per cent than those for the immediately preceding period of three years, provided that at the end of ten years from the commencement of the Constitution such grants, to the extent to which they are a special concession, shall cease. The second proviso to that Article, however, provides that no educational institution shall be entitled to receive any grant under this Article unless at least forty per cent of the annual admission therein are made available to members of communities other than the Anglo-Indian community.

1. *In re Kerala Education Bill*, 1957 SRCJ Prs. 8-9: 1958 SC 956 (966) para 6.

## Commencement of the Constitution

### S Y N O P S I S

- 3·1. Commencement of the Constitution.
- 3·2. President's power to remove difficulties in relation to the transition from the provisions of Government of India Act to the Constitution.
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#### 3·1. *Commencement of the Constitution.*

Article 394, and Articles 5, 6, 7, 8, 9, (dealing with citizenship as on 26th January, 1950), Art. 60 requiring the President of India to take oath, Art. 324 (dealing with election), Articles 366, 367 (regarding the Interpretation of the Constitution), Arts. 379, 380, 391, 392, 393, came into force on 26th Nov. 1949, and the remaining provisions of the Constitution came into force on the 26th January, 1950, which day is referred to in the Constitution as the commencement of the Constitution.<sup>1</sup>

#### 3·2. *President's power to remove difficulties in relation to the transition from the provisions of Government of India Act to the Constitution.*

For the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the

1. *Constitution*, Art. 394.

provisions of the Constitution, the President was given the power to direct, by order that the Constitution shall during such period as may be specified in the order, have effect subject to such adaption, whether by way of modification, addition or omission as he may deem necessary or expedient.<sup>1</sup> This power of the President was not however absolute. He may not make any such order after the first meeting of Parliament duly constituted under Chapter II of Part V<sup>2</sup>, of the Constitution. Again every such order was required to be laid before Parliament.<sup>3</sup>

The power conferred on the President by Art. 392, by Article 324, by clause (3) of Art. 367 and by Article 391, shall before the commencement of the Constitution, be exercised by the Governor-General of the Dominion of India.<sup>4</sup>

### 3.3. *'Savings to maintain Continuity.'*

In order to maintain continuity the Constitution made Temporary Transitional and Special Provisions. These are contained in Part XXI of the Constitution.

The Constitution also made provisions as to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council<sup>5</sup> as to Courts, authorities; or offices<sup>6</sup> as both Judges of the High Court<sup>7</sup> as Comptroller and Auditor General of India<sup>8</sup> and as to Public Service Commission.<sup>9</sup>

The Judges of the Federal Court holding office immediately before the commencement of this Constitution unless they had elected otherwise, became on such commencement the Judges of the Supreme Court and thereupon they became entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as were provided for under Article 125 in respect of the Judges of Supreme Court.<sup>10</sup>

All suits, appeals and proceedings, civil or criminal pending in the Federal Court at the commencement of this Constitution stood removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same. The judgments and orders of the Federal Court delivered or made before the commencement of this Constitution were to have the same force and effect as if they had been delivered or made by the Supreme Court.<sup>11</sup>

Nothing in this Constitution was to operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order on any court within the territory of India in so far as the exercise of such jurisdiction was authorised

1. Constitution, Art. 392.
2. Constitution, Art. 392 (1) Proviso.
3. Constitution, Art. 392 (2).
4. Constitution, Art. 392 (3).
5. Constitution, Art. 374 (1).
6. Constitution, Art. 375.
7. Constitution, Art. 376.
8. Constitution, Art. 377.
9. Constitution, Art. 378.
10. Constitution, Art. 374 (1).
11. Constitution, Art. 374 (2).



by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.<sup>1</sup>

On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State cease, and all appeals and order proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.<sup>2</sup>

Further provision may be made by Parliament by law to give effect to the provisions of this article.<sup>3</sup>

All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of the Constitution.<sup>4</sup>

Notwithstanding anything in clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they had elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as were provided for under Article 221 in respect of the Judge of such High Court.<sup>5</sup>

Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.<sup>6</sup> This provision was made because at the relevant time there were some Judges of the High Courts who were not citizens of India.

The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall unless they had elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall notwithstanding anything in clauses (1) and (2) of Article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.<sup>7</sup>

The Auditor-General of India holding office immediately before the commencement of this Constitution, shall unless he had elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and to such rights in respect of leave of absence and pension as were provided for under clause (3) of Art.

1. *Constitution*, Art. 374 (3).

2. *Constitution*, Art. 374 (4).

3. *Constitution*, Art. 374 (3).

4. *Constitution*, Art. 375.

5. *Constitution*, Art. 376 (1).

6. *Constitution (First Amendment) Act*, 1951 s. 13.

7. *Constitution*, Art. 376 (2).

148 in respect of the Comptroller and Auditor-General of India and he became entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.<sup>1</sup>

The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall unless they had elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall notwithstanding anything in clauses (1) and (2) of Art. 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which applicable immediately before such commencement to such members.<sup>2</sup>

The members of Public Service Commission of a Province or of a Public Service Commission serving the needs of group Provinces holding office immediately before the commencement of the Constitution unless they had elected otherwise, became on such commencement the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and notwithstanding anything in clauses (1) and (2) of Art. 316 but subject to the proviso to clause (2) of that article, would continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.<sup>3</sup>

The Constitution repealed the Indian Independence Act, 1947 and the Government of India Act, 1935 together with all enactments amending or supplementing the latter Act but not including the of Abolition of the Privy Council Jurisdiction Act, 1949. But notwithstanding the repeal, but subject to other provisions of the Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.<sup>4</sup>

### 3.4. *President's power to make adaptation and modification of laws to bring them in conformity with the Constitution.*

For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modification of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.<sup>5</sup>

Nothing in clause (2) shall be deemed: (a) to empower the President to make any adaptation or modification of any law after the expiration of (three years from the commencement of this Constitution; or (b) to prevent any competent legislature or other competent authority from repealing any law adapted or modified by the President under the said clause.<sup>6</sup>

1. *Constitution*, Art. 377.

2. *Constitution*, Art. 378 (1).

3. *Constitution*, Art. 378 (2).

4. *Constitution*, Art. 372 (1).

5. *Constitution*, Art. 372 (2).

6. *Constitution*, Art. 372 (3).

The expression "law in force" in this article included a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.<sup>1</sup>

Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.<sup>2</sup>

Nothing in this Article shall be construed as continuing as temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.<sup>3</sup>

An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

The effect of the repeal as contained in Art. 395, of the Constitution is not to effect the rights and liabilities already accrued under the Indian Independence Act and the orders passed by the Governor-General thereunder.<sup>4</sup>

President had passed the Adaptation of Laws Order, 1950, for the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh-Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law.<sup>5</sup>

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.<sup>6</sup>

### 3.5. Article 372—Object of.

The object of Article 372 is to maintain the continuity of the pre-existing laws, after the Constitution came into force. Without the aid of such an Article there would have been utter confusion in the field of law.

1. *Explanation I*, Art. 372.

2. *Explanation II*, Art. 372.

3. *Explanation III*.

4. *Constitution*, Art. 395.

5. *Constitution*, Art. 372-A (1).

6. *Constitution*, Art. 372-A (2).

The assumption underlying the article is that the state laws may or may not be within the legislative competence of the appropriate authority under the Constitution. The Article would become ineffective and purposeless if it was held that pre-Constitution laws should be such as could be made by the appropriate authority under Constitution. The words "Subject to the other provisions of the Constitution" should be given a reasonable interpretation which would carry out the intention of the makers of the Constitution. The Article posits the continuation of the pre-existing laws made by a competent authority notwithstanding the repeal of enactments referred to in Art. 395 and the word "other" in the Article can apply to provisions other than those dealing with legislative competence. A pre-constitution law-made by a competent authority though it has lost its legislative competency under the Constitution shall continue in force, provided the law does not contravene the "other provisions" of the Constitution.<sup>1</sup> The words "Subject to other provisions of the constitution" mean that if there is an irreconcilable conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency. An Article of the Constitution by its express terms may come into conflict with a pre-constitution law wholly or in part, the said Article or Articles may also be by necessary implication came into direct conflict with the pre-existing law. It may also be that the combined operation of a series of Article may bring about a situation making the existence of the pre-existing law incongruous in that situation. Whatever it may be, the inconsistency must be spelled out from the other provisions of the Constitution and cannot be built up on the supposed political philosophy underlying the Constitution.<sup>2</sup> The Supreme Court held that Art. 372 should be read subject to Art. 277.<sup>3</sup>

While Art. 372 saves all pre-Constitution valid laws, Art. 277 is confined to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore Art. 372 can not be construed in such a way as to enlarge the scope of the saving of taxes, duties cesses or fees. To state it differently Art. 372 must be read subject to Art. 277.<sup>4</sup>

Under Art. 372 of the Constitution all the laws in force in the territory of India immediately before the commencement of the Constitution continued to be in force therein until altered or repealed by a competent legislature or other competent authority. The words "Laws in force" are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law. An order must be a legislative and not an executive order.<sup>5</sup>

There is no material difference between an existing law and a law in force as defined in Art. 366 (1C) of the Constitution.<sup>6</sup>

The Constitution thus saved the existing laws, which means any law, Ordinance, byelaw rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, byelaw, rule or regulation.<sup>7</sup>

1. *South India Corporation v. Secretary Board of Revenue*, 1964 SC 207 (213-214).

2. *Ibid.*, p. 214.

3. *State of M. P. v. Bhopal Sugar Industries Ltd.*, 1964 S. C. 1179.

4. *Rajagopalachari v. Corporation of Madras*, 1964 SC 1172 (1178); *South India Corporation v. Secretary Board of Revenue*, 1964 SC 207 (214).

5. *Edward Mills Co. Ltd. v. State of Ajmer*, 1955 SC 25 (31).

6. *Ibid.*

7. *Constitution*, Art. 366 (10).

What survived the Constitution and what was continued under Art. 372 were those which could trace their origin to the exercise of legislative power.

### 3.6. *Nature of orders passed by Rulers of Indian States—when law*

Legislative, executive and judicial powers are all vested in an absolute monarch; he is the source or fountain of all these powers and any order by him would be binding within the territory under his rule without examining the question as to whether it was legislative, executive or judicial; but though all the three powers are vested in the same individual, that does not obliterate the difference in the character of those powers. The jurisprudential distinction between the legislative and the executive powers still remains, though for practical purposes, an examination about the character of these orders may serve no useful purpose. It is not as if where absolute monarchs have sway in their kingdoms, the basic principles of jurisprudence which distinguish between the three categories of powers are in-applicable. A careful examination of the order passed by an absolute monarch would disclose to a jurist whether the power exercised in a given case by issuing a given order is judicial, legislative or executive and the conclusion reached on jurisprudential grounds about the nature of the order and the source of power on which it is based would nevertheless be true and correct. *Prima facie*, it does not seem sound to suggest that in the case of an absolute monarch, that branch of jurisprudence which makes a distinction between three kinds of power is entirely inapplicable.<sup>1</sup>

In *Raj Kumar Narsing Pratap Singh Deo*' case,<sup>2</sup> the Supreme Court did not lay down general proposition about the irrelevance or inapplicability of the well recognised distinction between legislative and executive acts in regard to the orders issued by absolute monarchs. The true legal position is, that whenever a dispute arose as to whether an order passed by an absolute monarch represented a legislative act all relevant facts must be considered before the question is answered. These relevant factors are, (i) the nature of the order, (ii) the scope and effect of its provisions, (iii) its general setting and context, (iv) the method adopted by the Ruler in promulgating legislative as distinguished from executive orders. These and other allied matters would have to be examined before the character of the order is judicially determined. We need only add that this must be so when the contention is that a particular order of the Ruler has been continued as a law by Art. 372 of the Constitution. In *Union of India v. Gwalior Rayons Silk Co.*<sup>3</sup> Wanchoo, J. said, "We cannot impute to the constitution-makers an intention to continue each and every order of an absolute Ruler as a law whatsoever be its nature. When Art. 372 of the Constitution speaks of continuance of laws in 1950 the jurisprudential distinction between legislative, judicial and executive acts must have been present in the mind of the constitution-makers and that distinction must always be kept in mind by courts in deciding whether a particular order of an absolute Ruler is law for the purpose of its continuance under Art. 372. It may be that the order might not be liable to challenge by any one in the State, while the Ruler was there and in that sense the word of a Ruler might be law in his State. But when we are considering whether a particular order of a Ruler continues under Art. 372 as a law we cannot forget the jurisprudential distinction between legislative, judicial and

1. *Raj Kumar Narsing Pratap Singh Deo v. State of Orissa*, 1964 SC 1793 (1796).

2. 1964 SC 1793.

3. 1964 SC 1903.

executive acts only those orders of the Ruler which are jurisprudentially legislative acts will continue as laws under Art. 372 of the Constitution. Therefore, simply because the order dated January 18, 1947 was passed by an absolute Ruler it does not necessarily follow that it is law for the purpose of Art. 372 and we have to see after looking into all the various considerations referred to above whether the order can be jurisprudentially said to be a law in order that it may continue as law under Art. 372 of the Constitution".<sup>1</sup>

Stated broadly, a law generally is a body of rules which have been laid down for determining legal rights and legal obligations which are recognised by courts. In that sense, a law can be distinguished from a grant, because in the case of a grant, the grantor and the grantee both agree about the making and the acceptance of the grant; not so in the case of law. Law in the case of an absolute monarch is his command which has to be obeyed by the citizen whether they agree to it or not.

The question whether an order made by a Ruler of a State was "law" or a mere 'grant' came up for discussion before the Supreme Court in several cases.

The first case was that of *Ameer-un-Nissa Begum v. Mehaboob Begum*,<sup>2</sup> In that case, the Supreme Court was called upon to consider the validity of the *Firman* issued by the Nizam of Hyderabad on the 19th February, 1939 by which a special Commission had been constituted to investigate and submit a report to him in the case of succession to a deceased Nawab which was transferred to the commission from the file of Darul Quaza Court. Dealing with the question as to whether the *Firman* in question was passed by the Nizam in exercise of his legislative power or judicial power. Mukherjea, C.J., speaking for the Court, observed: "The Nizam was the Supreme legislature, the supreme judiciary and the supreme head of the executive and there were no constitutional limitations upon his authority to act in any of these capacities. He also observed that the *Firmans* were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law; therefore, so long as a particular *Firman* held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later *Firman* at any time that the Nizam willed."

In *Director of Endowments Government of Hyderabad v. Akram Ali*,<sup>3</sup> similar observations were made by Bose, J. who spoke for the Court on that occasion. Dealing with the *Firman* issued by the Nizam on the 30th December, 1920, which directed the Department to supervise the Dargah until the rights of parties were enquired into and decided by a Civil Court, it was observed that the Nizam was an absolute sovereign regarding all domestic matters at the time when the *Firman* was issued and his word was law. In *State of Rajasthan v. Sajjan Lal*<sup>4</sup> following these decisions the Supreme Court held that the *Firman* issued by the Ruler vesting the management of the Temple and its properties in the ruler of Udaipur, was law.

The next case that came to the Supreme Court was *Madhorao Phalke v. State of M.P.*<sup>5</sup> The Court considered the question as to whether the

1. *Union of India v. G. R. Silk Mfg. Weaving Co.*, 1964 SC 1903 (1911).
2. AIR 1955 SC 352 (359).
3. AIR 1956 S C 60.
4. 1975 SC 706.
5. (1961) 1 SCR 957; 1961 SC 298.

relevant *Kalambandhis* issued by the Ruler of Gwalior constituted law or amounted merely to executive orders. "Having regard to the contents of the two orders and the character of the provisions made by them in a detailed manner, the Supreme Court held that it was difficult to distinguish them from statutes or laws; in any event, they must be treated as rules or regulations having the force of law. Though the judgment repeated the general observations made by the Supreme Court on two earlier occasions, it would be noticed that the decision was based not as much on the said observations, as on a careful examination of the provisions contained in the *Kalambandhis* themselves.

In *Pramod Chandra Deb v. State of Orissa*,<sup>1</sup> the Supreme Court held that the grant with which the Court was concerned, read in the light of Order 31 of the Rules, Regulations and Privileges of Khanjadars, and Khorposhdars, was law. In discussing the question, Sinha, C.J. referred to Order 31 of the Rules and Regulations and observed that like the *Kalambandhis* in the case of *Phalke*,<sup>2</sup> the said rules had the force of law and would be existing law within the meaning of Art. 372 of the Constitution.

In the case of *Govindlalji Maharaj v. State of Rajasthan*,<sup>3</sup> while dealing with the question as to whether the *Firman* issued by Udaipur Darbar in 1934 was law or not, the Supreme Court examined the scheme of the said *Firman*, considered its provisions, their scope and affect and came to the conclusion that it was law. In *Jayant Rao v. Khandra Kant Rao*,<sup>4</sup> the order of the Ruler making a Jagir an impartible estate to be governed by the Rule of Primogeniture was law.

An agreement of the Ruler expressed in the shape of a contract cannot be regarded as law. A law must follow the customary forms of law making and must be expressed as binding rule of conduct. It is not every direction of the will of the Ruler however expressed, which amounts to a law. An indication of the will meant to find as a rule of conduct and enacted with some formality either traditional or specially devised for the occasion, results in a law but not an agreement to which there are two parties one of which is the Ruler.<sup>5</sup>

In the case of *Shree Umaid Mills Ltd. v. Union of India*<sup>6</sup> a similar question arose for the decision of the Supreme Court in regard to an agreement made on the 17th April, 1941. The point urged before the Court was that the said agreement was law. The Court examined the observations in the previous case and the context in which they were made and rejected the plea that the observations were made in the previous cases intended to lay down a general proposition that in the case of an absolute monarch, no distinction could be made between his legislative and his executive act. In the result, the agreement in question was held to be no more than a contract which was an executive act and not a law within the meaning of Art. 372. The same view was expressed by four judges of the Supreme Court in *State of Gujarat v. Vora Fiddali*.<sup>7</sup>

1. (1962) Supp. (1) SCR 405 (410); AIR 1962 SC 1288.

2. *Madhorao Phalke v. State of M. P.*, AIR 1961 SC 298 : (1961) 1 SCR 957.

3. AIR 1963 SC 1638.

4. (1970) 1 SCC 702.

5. *Bengal N. C. Mills v. Board of Revenue, M.P.* 1964 SC 888.

6. AIR 1963 SC 953

7. 1964 SC 1043.

In *Narsing Pratap Singh Deo v. State of Orissa*,<sup>1</sup> the question was whether the Sanad issued in favour of the appellant by his elder brother, the Ruler of Dhenkanal State was existing law. The Court examined the Sanad and it held that there was no legislative element in any of the provisions of this grant. It did not contain any command which had to be obeyed by the citizens of the State ; it was a gift pure and simple made by the Ruler in recognition of the fact that under the custom of the family and the customary law of the State, he was bound to maintain his junior brother. The grant, therefore, represented purely an executive act on the part of the Ruler intended to discharge his obligations to his junior brother under the personal law of the family and the customary law of the State. "It would", observed Gajendragadkar, CJ, "be idle to suggest that such a grant amounts to law. It is true that partly it is based on the requirement of personal and customary law ; but no action taken by the Ruler personal or customary law can be assimilated to an order issued by him in exercise of his legislative authority. Therefore, we have no difficulty in holding that the Sanad in question is a purely executive act, and cannot be regarded as law."<sup>2</sup>

Similar view was taken in *State of M. P. v. Bhagvendra Singh*<sup>3</sup> and *State of M.P. v. Lal Singh*.<sup>4</sup> There the order was in the form of a grant under which Kothi (house) etc. and Rs. 5000/- in a lump was to be made available to Sri Lal Sahib. The Ruler provided for some thing out of his bounty and in discharge of his moral obligation. A law, the Supreme Court said, was never made for these reasons. An agreement of the Ruler expressed in the shape of a contract cannot be regarded as law.<sup>5</sup>

There is generally an established method for the enactment of laws, and the laws when enacted have also a distinct form. It is not every indication of the will of the Ruler however expressed which amounts to law. An indication of the will meant to bind as a rule of conduct and enacted with some formality either traditional or specially devised for the occasion results in a law, but not an agreement to which there are two parties, one of which is the Ruler.<sup>6</sup>

On April 7, 1947 an agreement was entered into between the Government of Gwalior and Birla Brothers Limited incorporating the terms acceptance of which had been signified by the Ruler of Gwalior on January 18, 1947. The fact that the order was called a Darbar order was again of no significance for it was the Ruler who was signifying his acceptance of the request and the matter was cast in the form of a Darbar Order because his officers would have to carry out what he had decided. There is, therefore, no doubt, that the order of January 18, 1947 cannot be read independently of the agreement of April 7, 1947 and must be read in the context of the entire set of circumstances beginning from the letter of Birla Brothers Limited dated October 17, 1946 and ending with the agreement of April 7, 1947, and so read, the order must be held to be a mere signification of the acceptance of the request and cannot be held to be a law even with respect to that part of it which dealt with exemption from income-tax. Further the form and content of the order are against its being a law. Finally the fact that it was never published and remained only on the file concerned has also a bearing on the question and shows that it was not a law but a mere signification of the Ruler's

1. 1964 SC 1793.

2. *Ibid.*, p. 1799.

3. 1966 SC 704.

4. 1966 SC 820.

5. *Shree Umaid Mills Ltd. v. Union of India*, 1963 SC 953.

6. *Bengal N. C. Mills. v. Board of Revenue, M. P.*, 1964 SC 888 (891).



acceptance of the request made by Birla Brothers Limited. It is plain that the order must, in the context be treated as one step in the negotiations between the parties which ultimately led to the agreement; and so it would be idle to dissociate it from the said negotiations and treat it as a law. Besides the fact that the parties entered into a formal contract in writing embodying these concessions by the Ruler as consideration for the obligation on the part of Birla Brothers Limited to start the named industries in Gwalior State, is really decisive to negative the argument urged by the company. The agreement having force as a contract undoubtedly that was the intention both of the Government of the Ruler and of Birla Brothers Limited is wholly irreconcilable with a law operating side by side simultaneously and *de hors* the contract.<sup>1</sup>

### 3.7. Common Law of England.

In *Director of Rationing v. Corporation of Calcutta*,<sup>2</sup> the Supreme Court held that State was not bound by the provisions of Section 386 (1) (a) of the Calcutta Municipal Act, 1923. Sinha, C. J., speaking for Imam and Shah, JJ. gave one judgment. Sarkar, J. gave a separate but concurrent judgment. Wanchoo, J. recorded his dissent. Sinha, C. J. said:

“It is well established that the common law of England is that the King’s prerogative is illustrated by the rule that Sovereign was not necessarily bound by a statutory law which bound the subject. This is further enforced by the rule that the King is not bound by a statute unless he is expressly named or unless, the statute being for the public good, it would be absurd to exclude the King from it.”

Wanchoo, J in his dissent said: “Two things are clear from this modern conception of royal prerogative, namely (1) that there must be a Crown or King to whom the royal prerogative attaches, and (2) that the prerogative must be part of the common law of England. Both these conditions existed when the Privy Council decision<sup>3</sup>, was given in October 1946; the King was still there and the Privy Council held that the English common law rule of construction applied to Indian Legislation as much as to English statutes.<sup>4</sup> ‘In our country the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Part III, thereof as well as by other provisions in other parts.....It is to my mind inherent in the conception of the Rule of Law that the State no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all powers executive, legislative and judicial has disappeared and in our republican constitution, sovereign power has been distributed and various organs created thereby, it seems to me that there is neither jurisdiction nor necessity for continuing the rule of construction based on the royal prerogative.’<sup>5</sup> “But where the royal prerogative is merely a rule of construction of statutes based on the existence of the Crown in England and for historical reasons, I fail to see why in a democratic republic, the Courts should not follow the ordinary principle

1. *Union of India v. G.R. Silk Mfg. Co.*, 1964 SC 1913.

2. (1961) 1 SCR 158; 1960 SC 1355.

3. *Province of Bombay v. Municipal Corporation of the City of Bombay and another*, AIR 1947 PC 34 73 Ind. App. 271.

4. 1961 (1) SCR 158 (184); 1960 SC 1355 (1365).

5. 1961 (1) SCR 158 (185) : 1960 SC 1355- (1365-66).

of construction that no one is exempt from the operation of a statute unless the statute expressly grants the exemption or the exemption arisen by necessary implication.”<sup>1</sup>

The conflict between the two views expressed by the learned judges mainly rested on the meaning of the expression “Law in force” in Article 372 of the Constitution. While Sinha, C. J., took the view that the common law of England, including the rule of construction, was accepted as the law of this country and was, therefore, the law in force within the meaning of the said Article; Wanchoo, J. took the view that whatever might be said of the substantive laws, a rule of construction adopted by the common law of England and accepted by the Privy Council at a time when the Crown was functioning in India, was not the law in force within the meaning of the said Article.<sup>2</sup>

The validity of the conflicting views was considered by the Supreme Court in *State of West Bengal v. Corporation of Calcutta*.<sup>3</sup>

Chief Justice Subba Rao speaking for seven Judges summed up the position :

“Some of the doctrines of common law of England were administered as the law in the Presidency Towns of Calcutta, Bombay and Madras. The common Law of England was not adopted in the rest of India. Doubtless some of its principles were embodied in the statute law of our country. That apart, in the Muffasil, some principles of common law were invoked by courts on the ground of justice, equity and good conscience. It is, therefore, a question of fact in each case whether any particular branch of the Common Law became a part of the law of India or in any particular part thereof. The aforesaid rule of construction is only a canon of interpretation; it is not a rule of substantive law. In short it has not become a law of the land.”<sup>4</sup>

In *State of West Bengal v. Corporation of Calcutta*<sup>5</sup> the Supreme Court also considered the question whether the Supreme Court should adopt the rule of construction accepted by the Privy Council in interpreting statutes *vis-a-vis* the Crown. Subba Rao, C. J. speaking for the Bench said:

“There are many reasons why the said rule of construction is inconsistent with and incongruous in the present set up. We have no Crown: the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. To illustrate: (1) State ‘A’ made a general Act without expressly making the Act binding on the said State. In the same State, States ‘B’, ‘C’ and ‘D’ and the Union have properties. Would the rule of construction apply only to the properties of State ‘A’ or to the properties of all the States and the Union? (2) The Central Act operated in different States; the rule of construction may be accepted in some States and rejected in other States. Is the Central Act to be construed in different States in different ways? (3) Acts in general terms might be made in different States—States where the said rule of

1. 1961 (1) SCR 158 (188-189) : AIR 1960 SC 1355 (1367).

2. *State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997 (1018).

3. *Ibid.*

4. *Ibid.*, p. 1007.

5. *Ibid.*

construction was accepted and the States where it was not so accepted. Should different States construe the general Acts in different ways, some applying the presumption and some ignoring it? There is, therefore no justification for the Supreme Court to accept the English canon of construction for it brings about diverse results and conflicting decisions. On the other hand, the normal construction, namely that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies. It *prima facie* applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. This natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempt from the operation of an Act, under certain circumstances such an exemption may necessarily be implied. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the State. We therefore hold that the said canon of construction was not the law in force within the meaning of Article 372 of the Constitution and that in any event having regard to the foregoing reasons the said canon of construction should not be applied for construing statutes in India.”<sup>1</sup>

### 3-8. Priority of debts due to the State.

In *Builders Supply Corporation v. Union of India*,<sup>2</sup> the question was whether the doctrine of priority which was based on common law and which was recognised by the High Courts prior to 1950 could be said “to constitute Law in force” in the territory of India within the meaning of Article 372 (1). The Supreme Court following its previous decision in *Director of Rationing v. Corporation of Calcutta*<sup>3</sup> held that the rules of common law relating to substantive rights which had been adopted by this country and enforced by judicial decision would amount to “law in force” in the territory of India at the relevant time within Article 372 (1). The claim for priority made by the Union of India was sustained, because it was based on a common law doctrine which had been applied and upheld in that part of India which was known as “British India” prior to the constitution. While laying down this principle the Supreme Court indicated that its decision was limited only to the case of the recovery of arrears of income tax and should not be extended to debts due to the state in relation to commercial activities which may be undertaken by the state for achieving “socio-economic good”. It was also pointed out that questions may arise as to whether the same common law doctrine would apply to those parts of India which constituted the former Indian states in which the common law of England was not the law in force on the date on which the constitution came into force having regard to the provisions of Article 372 (1) of the Constitution.

In *Collector Aurangabad v. Central Bank*,<sup>4</sup> it was argued that the authority of the decision of the Court in *Builders Supply Corporation v. Union of India*,<sup>5</sup> had been affected to some extent by the later decision of a larger Bench of the Court in *State of West Bengal v. Corporation of*

1. *State of West Bengal v. Corporation of Calcutta*, 1967 SC 997 (1007-08) (1967) : 2 SCR 170 (282).

2. (1965) 2 SCR 289; 1965 SC 1061 (1068-69).

3. (1961) 1 SCR 158 : 1960 SC 1335.

4. 1967 SC 1831.

5. 1965 SC 1061.

*Calcutta*.<sup>1</sup> The Supreme Court said that there was nothing in the judgment, which affected the decision of the Court given in the *Builders Supply Corporation v. Union of India*;<sup>2</sup> on the other hand the majority judgment of the Chief Justice had referred to the decision in *Marshall v. New York*<sup>3</sup> which had laid down the doctrine that the State of New York had the common law prerogative right of priority over unsecured creditors and had distinguished the case on the ground that it had nothing to do with the rule of construction but was based upon the common law prerogative of the Crown. In this case the Supreme Court however did not apply the English doctrine of common law priority of Crown debts because there was no proof that the doctrine had been given judicial recognition in the territory of Hyderabad prior to 26th January, 1950, the date on which the Constitution came into force.

The doctrine of common law with regard to the payment of debts of equal degree due to the state as against the citizen was in no way inconsistent with the provisions of the Constitution.<sup>4</sup>

### 3.9. Privy Council decision not binding on Supreme Court.

The Supreme Court is not bound by any decision of the Privy Council and is free to consider the question on its own merits.<sup>5</sup> Decision of Privy Council was not followed by the Supreme Court in *State of Bihar v. Abdul Majid*.<sup>6</sup> It could not be treated on the same footing.

The continuance of laws is subject to the other provisions of the Constitution and the continuance is only until altered or repealed or amended by a competent Legislature.<sup>7</sup> In *State of Madras v. C. G. Menon*<sup>8</sup> the Government of India's assistance was sought to arrest and return the respondents to the colony of Singapore under the provisions of the Fugitive Offenders Act 1981. On the finding that the Fugitive Offenders Act, an act of the British Parliament had not been adapted, the Supreme Court held that Sections 12 or 14 of the Fugitive Offenders Act did not have any force in India by reason of the provisions of Article 372 of the Constitution.

1. 1967 SC 1061.

2. 1967 SC 1061

3. 65 L. ed. 315.

4. *Union of India v. Official Assignee*, 73 Bombay Law Reporter 623 (631).

5. *Kunjuvaru v. State of Travancore Co.*, 1956 SC 142 (145).

6. 1954 SC 517.

7. *Sriniwas v. Narayan*, 1954 SC 379 (387).

8. 1954 SC 245 (249).

## Preamble—Philosophy of the Constitution

### SYNOPSIS

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#### 4.1. *Constitution emanates from People.*

The Constitution of the United States was “ordained and established” as the preamble of the Constitution declares, by the people of the United States.<sup>1</sup>

This formula expresses the idea of popular sovereignty and has rather a political than a legal significance since it was not the people of the United States, but an assembly composed of representatives of thirteen States of the Confederation which adopted the Constitution that came into force and thus was “established” by the ratifications of the States forming the original Confederation. The “people of the United States” could not be the author of the constitution since the people of the United States, as a legal entity, was first constituted by the Constitution.<sup>2</sup>

The opening words of the Preamble of the Charter of the United Nations were modelled upon the opening words of the Constitution of the United States. “We the people of the United Nations determined to save succeeding generations from the scourge of war.....and to reaffirm faith in fundamental human rights, have resolved to accomplish these ends..... Accordingly, our respective governments through representatives have agreed to the present Charter of the United Nations and do hereby establish an organization to be known as the United Nations.”

Not the ‘peoples’, but the governments ‘resolved’ to combine their efforts to accomplish these aims. The resolution to combine the efforts of the United Nations to accomplish the aims determined in the Preamble is identical with the conclusion of the treaty called Charter of the United Nations; and the conclusion of this treaty is not a common act of the people of the United Nation but of their governments. Even the last phrase ‘Accordingly, our respective Governments, through representatives...have agreed to the present charter of the United Nations and do hereby establish an international organisation to be known as the United Nations’ is legally not correct. For the governments are not organs of the peoples, but of the states, and by signing the text of the Charter their representatives assembled in San Francisco had not ‘established’ the Organisation; the Organisation had been ‘established’ by the coming into force of the Charter on October 24, 1945; and this was the effect of the ratifications made in accordance with Article 110 of the Charter, not of the signatures affixed to the text of the Charter in San Francisco on June 26, 1945.<sup>3</sup>

“The last sentence of the Preamble”, says Kelsen, “is incorrect also for another reason. The words: ‘Our respective governments’ refer to the ‘people of the United Nations’ mentioned at the beginning of the Preamble. The meaning of this term may be doubtful. The peoples whose governments established the United Nations became peoples of this Organization, that means peoples of the states original Members of the Organisation, only after the Charter came into force. Prior to this date the peoples of the

1. *Martin v. Hunter's Lessee*, 4 L. Ed. 102.

2. Kelsen: *The Law of the United Nations*, p. 6-7.

3. Kelsen: *The Law of the United Nations*, p. 7.

United Nations were the peoples of the states whose governments signed the declaration of the United Nations on January 1, 1942.”

The Preamble to the Constitution of India declares :

**WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens :**

**JUSTICE, social, economic and political ;**

**LIBERTY of thought, expression, belief, faith and worship ;**

**EQUALITY of status and of opportunity ;**  
and to promote among them all

**FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation ;**

**IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.**

The Preamble clearly acknowledges, recognises, and proclaims that the Constitution emanates from the people. Unless a man is an absolute pedant one cannot understand that a body of people 292 in number, representing this vast continent, in their representative capacity could not say that they were acting in the name of the people of this country'.<sup>1</sup>

The observation of Mathew, J. in *Keshavanand Bharti's*<sup>2</sup> case that the assertion by some of the maker of the Constitution proceeded from the people, can only be taken as a historical flourish meaning nothing. The statement in the Preamble that the people of this country conferred the Constitution themselves is not open to challenge before the Courts. Any one who knows the composition of the Constituent Assembly can hardly dispute the claim of the members of the Assembly that their voice was the voice of the people. They were truly the representatives of the people even though, they had been elected under a narrow franchise. The Constitution framed by them has been accepted and worked by the people for the last 32 years and it is too late in the day now to question the fact that the people of this country gave the Constitution to themselves.

#### 4.2. Preamble—Key to the understanding of the Constitution.

The Preamble is meant to embody in a very few and well defined words the key to the understanding of the Constitution.<sup>3</sup> The preamble serves several important purposes. Firstly, it indicates the source from which the constitution comes viz, the people of India. Next, it contains the enacting clause which brings into force the constitution. In the third place, it declares the great rights and freedoms which the people of India intended to secure to all its citizens and the basic type of government and policy which was to be established.<sup>4</sup> Indeed the preamble to the Constitution embodies the philosophy of the Constitution.

The Constitution has a noble and grand vision contained in the Preamble.

1. Ambedkar : *Constituent Assembly Debates*, Vol. 10, 455.

2. *Keshavanand Bharti v. State of Kerala*, 1973 (4) SCC 420 (481), Mathew, J.

3. *Keshavanand Bharti v. State of Kerala*, 1973 (4) SCC 420.

4. *Ibid.*, p. 424 per Shelat and Grover, JJ.

The preamble embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime.<sup>1</sup>

#### 4.3. *India—a Sovereign Democratic Republic.*

The preamble declares that India is sovereign, socialist, secular democratic republic. It was under the Indian Independence Act, 1947<sup>2</sup> that the two Independent Dominions, India and Pakistan were set up. In each of the new Dominions it was provided by section 5 of the Act that there shall be a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the Government of the Dominion. The Indian Independence Act recognised the Constituent Assembly in relation to India the first sitting of which was held on 9th December, 1946<sup>3</sup> and section 8 of the Act provided that the power of the legislature of the Dominion (created under Section 6 of the Act) shall for the purpose of making provision as to the Constitution of the Dominion of India be exercisable in the first instance by the Constituent Assembly of India.

The Constituent Assembly derived its legal competence to frame the Constitution from section 8 (1) of the Indian Independence Act, 1947. The British Parliament, by virtue of its legal sovereignty over India, passed the said enactment and invested the Assembly with power to frame the Constitution. Whatever might be the Constitutional result flowing from the doctrine that sovereignty was inalienable and that the Indian Independence Act itself could have been repealed by Parliament, independence, once granted, could not be revoked by an erstwhile sovereign; at any rate, such revocation would not be recognised by the Courts of the country to which independence was granted. What makes a transfer of sovereignty binding is simply the possession on the part of the transferee, of power and force sufficient to prevent the transferer from regaining it.<sup>4</sup>

The primary objective before the Constituent Assembly was to constitute India into a Sovereign, Democratic, Republic. On 26th November, 1949 the Constitution as settled by the Constituent Assembly was passed. The assembly then adjourned and met again on the 26th January, 1950. On that date members of the Assembly signed the copies of the constitution and Dr. Rajendera Prasad was elected the President of India.

The Indian Independence Act, 1947, and the Government of India Act, 1935, with all enactments amending or supplementing the later Act were repealed by Art. 395 of the Constitution.

On 26th November, 1949, India became a Sovereign Democratic Republic. From that day India had a government of the people by the people and for the people.

#### 4.4. *Preamble—a part of the Constitution.*

The preamble to the Constitution of the United States strictly speaking, is not a part of the Constitution but “walks before it.”<sup>5</sup> The preamble to the Indian Constitution was put to vote in the Constituent Assembly. Motion

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 420 per Shelat & Grover, JJ.
2. 10 & 11 Geo. 6030.
3. *Indian Independence Act*, Section 19 (3) (a).
4. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC (845), Mathew, J.
5. Corvin : *The Constitution what it means*, 14th Ed., p. 1 to the Constitution.



that “the preamble shall stand part of the constitution”, was adopted, and the preamble was added to the Constitution. It is thus a part of the constitution.<sup>1</sup> The view taken by the Supreme Court *In re Union Berubari*;<sup>2</sup> that the preamble was not a part of the Constitution was not accepted in *Keshavanand Bharti*’s case.<sup>3</sup>

As the preamble forms part of the Constitution it is amenable to amendment except in so far where it refers to matters which constitute the basic structure of the Constitution. No body could suggest that the preamble could be abrogated or wiped out.<sup>4</sup>

By the Constitution (Forty-second Amendment) Act, 1976, the preamble was amended. For the words “Sovereign Democratic Republic” the words “sovereign, socialist, secular, democratic Republic” were substituted. For the words “Unity of the Nation” the words “Unity and integrity of the Nation” were substituted.

We may now consider the nature of a Secular State.

#### 4.5. *Secular States.*

Secular mean that the Constitution requires a scrupulous neutrality by the State as among religions. The State must confine itself to secular objectives and neither advance nor impede religious activity. A secular purpose and a factual neutrality may not be enough if in fact the State is lending direct support to a religious activity. The State may not, for example, for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of those interests, lying out side the true and legitimate province of government.

The mandate of the First Amendment to the American Constitution is that “Congress shall make no law respecting an estalishment of religion or prohibiting the free exercise thereof.” This has been made wholly applicable to the States by the Fourteenth Amendment. It was set forth; Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.<sup>5</sup> The First Amendment’s, purpose was to create a complete and permanent separation of the spheres of religions activity and civil authority.

The manifest object of the First Amendment is to have a state without religion. It declared the principle of eternal seperation between church and state. Seperation means seperation not something less than Jefferson’s metaphor in describing the relation between Church and State speaks of a “wall of seperation” not a fine line easily overstepped.<sup>6</sup>

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225.

2. (1960) 3 SCR 250 (281-82): 1960 SC 845.

3. 1973 (4) SCC 225.

4. *Ibid.*, p. 425.

5. *Everson v. Board of Education*, 91 L. Ed. 711 (723).

6. *Illinois v. Board of Education*, 92 L. Ed. 649 (669).

The great danger of the theory that the State is committed to the defence and promotion of the faith—in practice, of course, the interests of one ecclesiastical group—was pointed out by Lord Acton in a critique of Luther's politics. Such an aim could bear only upon those outside the Church, since believers did of religion more than the law demanded. And the devotion of the State to one faith meant that a believer in church A could scarce be a conscientious subject of a state committed to Church B with the consequence the State could scarce tolerate him.<sup>1</sup>

Complete separation between the State and religion is best for the state and best for religion. The wholesome neutrality stems from recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert of dependency of one upon the other to the end. That official support of the state or the government would be placed behind the tenets of one or of all orthodoxies. This, in the limited sense the establishment clause prohibits. The free exercise clause recognises the right of every person to freely choose his own course with reference to religion free from any compulsion from the state.

Our Constitution has adopted a system of political philosophy that rejects all forms of religious faith and worship and has accepted the view that public education and other matters of public policy should be conducted without the introduction of a religious elements, but it, does not have a clause like the establishment clause.

The word "Secular" means that the government is neutral and while protecting all religions it prefers none and dislikes none.

Article 46 of the Australian Constitution provides that the common wealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religions. Section 116 does not however apply to the States, but only to commonwealth since religion as such falls under the residuary power of the States, and not within a specific head of common wealth. The effect of Section 116 is limited. The States are still competent to legislate with respect to religion and religious matters. The Preamble to the Australian Constitution which uses the words, "Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania humbly relying on the blessing of Almighty God have agreed to unite" imports a reliance on the religious spirit.<sup>2</sup>

Our Constitution is wedded to the principle that the State should refrain either penalizing or favouring any religion that is professed by any of its people and should "hold the ring" in the sense of restraining its people from contacting one another's religions.

What is guaranteed by the free exercise clause in the American Constitution is guaranteed by our Constitution in Articles 25 to 28.

Justice as fairness provides, strong arguments for an equal liberty of conscience.

#### 4.6. *Freedom of thought, liberty of conscience.*

Freedom of thought and belief, and of religious practice, may be regulated by the State's interest in public order and security. The state can favour no particular religion and no penalties or disabilities may be attached to any religious affiliation or lack thereof. The notion of a confessional state is

1. Acton: *History of Freedom*, p. 158; Bates: *Religious Liberty*, p. 314.

2. Ryan : *Constitution of Commonwealth of Australia*, 3rd Ed., p. 380.

rejected, by the Constitution. Instead, particular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation. The law protects the right of sanctuary in the sense that apostasy is not recognized much less penalized as a legal offence, any more than is having no religion at all. In these ways the state upholds moral and religious liberty.<sup>1</sup>

Liberty of conscience is limited, by reference to the common interest in public order and security.<sup>2</sup>

#### 4.7. *Republic—Meaning.*

India is a democratre republic. The term 'republic' has been rather freely applied to almost any kind of State that has no monarchical headship and has, with whatever limitations, some system of election to the office of the Head of the State. The historical anti-thesis of republic is monarchy and the term is more strictly applicable to democratic States. The head of a republic, the President, is elected, not hereditary. In one type of republic this head has mainly ceremonial functions above the conflict of parties, analogous to those of a constitutional monarch. The President of India is an example. In another type, represented by the United States, the President has the arduous task of combining the ceremonial offices of the head of the State, with the political activities of the head of the executive.<sup>3</sup>

#### 4.8. *Democracy—Different concepts examined.*

Before we examine the words 'democratic republic' we must know what democracy means.

In 1920, Viscount Bryce wrote that the universal acceptance of democracy was the normal and natural form of government. Seventy years ago the word democracy awakened dislike and fear. Now it is a word of praise. Popular power is welcomed.<sup>4</sup>

After the Second World War, UNESCO sponsored a study which obtained the views of more than a hundred scholars, both East and West on democracy. Surprisingly enough there were no replies adverse to democracy. Probably for the first time in history, democracy is claimed as the proper ideal description of all systems of political and social, advocated by influential proponents.

"Democracy" is difficult to define, not only because it is vague, like so many political terms, but more importantly, because what one person would regard as a paradigm case, another would deny was a democracy at all. The most diverse systems have been claimed as democracies of one sort or another, and the word has been competitively redefined, to match changes in extension by appropriate changes in intention. However, there is still this much agreement, democracy consists in "Government by the people" or "popular self-government". As such, it would still be universally distinguished from say, a despotism of Genghis Khan or Louis XIV, for instance or from a theocracy, like the Vatican. There remains plenty of room for disagreement,

1. Rawls: *Theory of Justice*, p. 211-12.

2. *Ibid.*, 212.

3. Mac Iver: *Web of Government*, p. 155.

4. Bryce: *Modern Democracies*, Vol. 1, p. 4.

however, about the conditions under which people can properly be said to rule itself.<sup>1</sup>

In the first place what is "the people"? The usual paradigm of a people governing itself is the direct democracy of ancient Athens, obviously the condition of face to face democracy, with direct participation can not be fulfilled within the political structure of modern states, both because of the size of their population, and because of the specialised knowledge needed to govern them. Democracy now becomes representative government, that is government by persons whom the people elect and there by authorise to govern them."<sup>2</sup>

In modern democracy, the people from whom all state authority emanates must be somehow represented so that in the conduct of political affairs the 'general will' may manifest itself in concrete decisions. Once the concept of democracy has been separated from its connection with the idea of a liberal state based on the rule of law, the designation 'democracy' in a formal sense can be used for any kind of representation, even for a 'leader' who is confirmed by the people by acclamation. Thus fascist leaders were fond of calling their dictatorships the 'purest form of democracy', and Lenin could say that there exists 'not the slightest contradiction in principle between Soviet (e. g. socialist) democracy and the use of dictatorial power by individual persons.'

The basic values and principles that prevail in a liberal democracy include such important political principles as; that government should be based on respect for the dignity of man and on freedom of conscience; that there should be independent judges, equality before the law, no slaves, no torture, no cruel punishment; that the principles of '*habeas corpus*' should give every arrested person the right to be heard by a judge who could, if detention was not warranted under the law, free him with or without bail; and that science, art, and press must go uncensored.

These principles were abandoned one by one, first by Communism (Bolshevism) next by Fascism, and then by National Socialism. All the three seemed to have one item in common with Western democracy that government should serve the greatest happiness of the greatest number, or at least of the greatest number within the respective country. But Communism, Fascism, and National socialism accepted this standard only in the sense that their dictatorial governments were to decide what the greatest happiness was and which minorities were to be excluded the capitalists, the liberals, the Jews, etc. Agreement on the essence of the principle had broken down.

The 'supreme principle' of the dictatorship of the proletariat is 'the alliance between the working class and the peasantry under the leadership of the working class and directed against the exploiting class'. But in reality, the 'leading role' of the proletariat excludes any real influence of 'those led.' Thus realization of the principle of popular sovereignty and of reliance on the majority remain purely intellectual exercises. Since the ruling class is represented by its most active and most conscious elements which are united in the Communist party, the 'party of the working class', the circle from which real political decisions emanate narrows down to this party and in view of its centralistic organization to a large extent to the party leadership. This is no longer a party in the sense of a free democracy, but an organization of a special kind for the political force that dominates the state. In this system,

1. *Encyclopedia of Philosophy*, Vol. 1, p. 338.

2. *Ibid.*, p. 339.

man is viewed as a member of class. He relates to the whole only through his class; the social order is essentially a system of class relations. This status makes permissible on principle any encroachment initiated by the ruling class, and based upon an individual's belonging to one class. Thus the equality of all citizens is replaced by division into leaders, 'those led' and 'oppressed' classes, and by promotion or oppression of individuals according to the class to which they belong. The individual as such cannot be entitled to fundamental rights in the sense of a liberal democracy. Even members of the ruling class are entitled to basic or fundamental rights only in so far as they do not stand in the way of class interests and consolidation of the dictatorship of the proletariat. Statements that fundamentally criticise concrete political decisions, and actions that are contradictory to the general political goal, cannot be legally protected..... Even scientific criticism of the theory of Marxism-Leninism or its application to practical experience can therefore not be permitted in general. Thus the most important political basic rights, especially the right to freely form and express one's opinion, must necessarily lose their meaning. Freedom of the press and of association are considerably restricted. Finally, even the remaining restricted sphere of man's individual freedom is not legally guaranteed since it can always be narrowed through legislation. These ideological foundations necessarily require corresponding political institutions. The supreme constitutional principle is the material goal fixed once for all by Marxist-Leninist theory to prepare for establishment of socialism and to smash and destroy the bourgeois, capitalist system. Since the state is ruled by one class and one party, the government set up by and recruited from this party cannot be exchanged and then only by the party. At least materially, the party must keep all political power concentrated within itself. There can be no multi-party system and opposition, no responsible government, and no effective separation of powers.

The differences between the two political and social systems are in the last analysis founded in the great difference between concepts of the position of the individual in the community and of the position of the state *vis-a-vis* the individual.

#### 4.9. *Essential rights and liberties in free democracy.*

In a free democracy the dignity of man is the supreme value. It is inviolable and must be respected and protected by the state. For the sake of his dignity, he must be guaranteed the largest possible scope for development of his personality. In the political social sphere, it is not enough for authority to look after the welfare of "subjects", no matter how well. Rather, the individual should participate responsibly and to the largest extent possible in decisions concerning the entire community. The state must make it possible for him to do so; it can accomplish this and mainly by guaranteeing freedom of intellectual controversy and discussion of ideas.

The free democratic order also deduces from the idea of man's dignity and freedom the task of insuring that justice and humanity exist in relationships among citizens themselves. This duty includes preventing exploitation of one individual by another. But free democracy refuses to equate exploitation of one individual by another. Also free democracy refuses to equate exploitation with the economic fact of hired labour in the service of private enterprise. Rather, liberal democracy considers it its task to prevent real exploitation, namely, exploitation of labour under degrading conditions and for insufficient wages. It is for this reason that the principle of the social state has been elevated to a constitutional principle.

Liberal democracy is imbued with the notion that it should be possible to develop freedom and equality of citizens, despite obvious conflicts between these two values.

Lord Hailsham in his recent book "The Dilemma of Democracy, Diagnosis and Prescription" puts the conflict sharply, as he sees it.

He begins by positing two theories of democracy which he says are wholly inconsistent, the one with the other. The first he calls the theory of centralised democracy or elective dictatorship; the second, the theory of limited government or freedom under law. The first, says Lord Hailsham :

".....will assert the right of a bare majority in a single chamber assembly, possibly elected on a first past the post basis, to assert its will over a whole people whatever that will may be. It will end in a rigid economic plan, and, I believe, in a siege economy, a curbed and subservient judiciary, and a regulated press. It will impose uniformity on the whole nation in the interest of what it claims to be social justice. It will insist on equality. It will distrust all forms of eccentricity and distinction. It will crush local autonomy. It will dictate the structure, form, and content of education. It may tolerate, but will certainly do its best either to corrupt or destroy religion. It will depend greatly on caucuses or cadres to exert its will. Some will be directly appointed by patronage as in the increasing number of 'Quangos'. Others will be elected by a tiny minority of dedicated activist and apparatchiks relying on the apathy of the rest as a passport to office. This is already happening in some unions and local authorities. It will worship material values, but not succeed in producing material plenty. When its policies fail, it will rely strongly on class divisiveness or scapegoats to distract attention from its failures."

'On the other hand', he says 'the theory of limited government offers precisely what the dominant theory denies. In place of uniformity it offers diversity. In place of equality it offers justice. In place of the common good, it protects the rights of minorities and the individual. As an alternative to regulation it propounds the rule of law. It does not seek to overthrow governments or institutions, or abolish universal franchise or popular rule. But it prescribes limits beyond which governments and Parliaments must not go, and it suggests means by which they can be compelled to observe those limits. In place of concentrating, it diffuses power. It confers rights of self government on previously ignored communities. It offers protection against the oppressiveness of unions and corporations'.<sup>1</sup> Above all it corresponds with the general conscience of mankind.<sup>2</sup>

Lord Hailsham's constitutional package includes a Bill of Rights, a proportionately elected second chamber, a limit by law on the right of Parliament to legislate without restriction.<sup>3</sup>

Lord Scarman's prescription is close to Lord Hailsham's. Lord Scarman wants a new constitutional settlement the basis of which would be entrenched provisions (including a Bill of Rights) and restraints upon administrative and legislative power, protecting it from attack by a bare majority in Parliament; a Supreme Court charged with the duty of protecting the constitution; an

1. *Modern Law Review*, Vol. 42, p. 7.

2. Lord Hailsham: *The Dilemma of Democracy and Prescription*, pages 9, 10 quoted in *Modern Law Review*, Vol. 42, p. 7.

3. *Ibid.*, p. 13.

immediate study to be begun of the problems of codification, drafting and interpretation in the new context of entrenched provisions and codified law; and the establishment of machinery for handling the problem of the law's development and reform, especially of administrative law.<sup>1</sup>

What, then, are the essential rights and liberties in a democracy? Primarily, they are of two sorts: (1) the rights appropriate to the maintenance of equality, in particular, the equalities of citizenship and of opportunity; and (2) the rights necessary to the maintenance of democracy itself, in particular, the liberties of speech and of political association. Though the latter, democracy maintains—and can alone maintain—that free play of conflicting opinions which makes possible the constitutional responsibility of the rulers to the ruled, which makes Government responsive to the governed. Though the former, democracy assures not (as some articles of democracy have absurdly held) the literal equality of all men in all things *viz.*, in intelligence, talent, achievement, status, power, and the like—but that equal access to public opportunity which enables a man to discover and to prove his true worth, and that political equality which counts each man in his suffrage and his citizenship as one and no more than one.<sup>2</sup>

In democratic states are all these rights in principle at least, constitutionally guaranteed. Only in democratic states is one free both to applaud and to attack the Government in power, to join with like minded men in the effort to make or to unmake that Government, to strive himself (if he so desires) to become a part of the ruling power, and not at any time to jeopardise his life or his safety by virtue of his participation in these activities.<sup>3</sup>

Thus, the things that are necessary in a democratic system are but matters of expediency in a non-democratic system. Whether, for example, the Soviet Union leaves its writers free to say what they will or requires them to conform to a prescribed pattern of production is a matter of programmatic choice and not a principle that implicates the system of Government itself. But in a democratic state to impair the right of free expression, or of any other essential right is to subvert the fundamental principles of the political order. It is to nullify the primary rules of the game. Such action, whether undertaken by private groups or by Governments, constitutes nothing less than an abuse of power.<sup>4</sup>

#### 4.10. *Democracy under the Constitution.*

Our Constitution has adopted the liberal democratic concept of democracy where all people can enjoy and develop their human capacities. The constitution is founded on the basic concepts of Justice, Equality, Liberty and Fraternity and incorporates the principles of Modern Socialism.

Neither federalism nor separation of powers is basic to democracy as is illustrated by the case of Britain, a democracy, that has a unitary system of Government (one without states) and a parliament without separation of power.

1. *Modern Law Review*, Vol. 42, p. 9: *English Law: The New Dimension*, p. 81-82.
2. David Spitz: *Democracy and Challenge of the power*, p. 15.
3. *Ibid.*, p. 16.
4. *Ibid.*, p. 16-17.

#### 4.11. *Democracy not just majority rule.*

The word 'democracy', as Mr. Attlee reminded the Trade Union Congress when the results of that election were known, 'means different things in different countries'. With us 'democracy' is not just majority rule, but majority rule with due respect to the rights of minorities.

It means that, while the will of the majority must prevail, there shall be a full opportunity for all points of view to find expression.' The Master of Balliol affirmed a like belief when addressing the House of Lords in the following year. 'We mean by democracy', he said, 'the kind of thing in which there is a responsible and tolerated opposition.' Those words are the key to the procedure of the Parliament at Westminster. If they should cease to be true, there would be an end of Government by discussion and Government by consent.<sup>1</sup>

#### 4.12. *Social Democracy.*

As the Preamble says that India is a Socialist democratic Republic, we must examine what social democracy means.

The expression "Social Democracy" usually points to the democratization of the society itself as expressed by its manners and customs, and particularly by the belief in what Bryce called "equality of estimation, that is, equal treatment and equal respect for every man. It should not be conferred with "Socialist democracy" which is a policy enforced by the State upon the Society.<sup>2</sup>

#### 4.13. *Socialist Democratic Republic.*

The concept of socialism or a socialist state has undergone changes from time to time, from country to country and from thinkers to thinkers. But some concept still holds the field. Common to almost all the Socialist parties of Western Europe is the surrender of the idea of nationalization or State-ownership of the means of production as a "first principle" of Socialism and the substitution of public control of enterprise and planning as the means of achieving economic growth.

In the case of *Akadasi Padhan v. State of Orissa*,<sup>3</sup> the question for consideration was whether a law creating a State monopoly was valid under the latter part of Article 19 (6) which was introduced in 1951. It was pointed out by Gajendragadkar, J.:

"With the rise of the philosophy of socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very

1. Ilbert: *Parliament*, p. 203-4.

2. *International Encyclopedia of Social Sciences*, Vol. 4, p. 113.

3. (1963) Supp. (2) SCR 691: 1963 SC 1047 (1053).



much influenced by these considerations, and treated it as a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output. The Court pointed out that the amendment in Article 19 (6) shows that according to the Legislature, a law relating to the creation of state monopoly should be presumed to be interest of the general public".

The difference pointed out between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the courts to lean more and more in favour of nationalisation and State ownership of an industry after the addition of the word 'Socialist' in the preamble of the Constitution. But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, is it possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interests of another section of the public namely the private owners of the undertakings? Most of the industries are owned by limited companies in which a number of shareholders, both big and small, hold the shares. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does socialism go to the extent of not looking to the interests of all such persons? In a State owned undertaking the Government or the Government company is the owner. If they are compelled to close down, they, probably, may protect the labour by several other methods at their command, even, sometimes at the cost of the public exchequer. It may not be always advisable to do so but that is a different question. But in a private sector obviously the two matters involved in running it are not on the same footing. One part is the management of the business done by owners or their representatives and the other is running the business for return to the owner not only for the purpose of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. Does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored? The questions posed are suggestive of the answers.<sup>1</sup>

#### 4.14. Capitalist Government.

**Capitalist Government.** "Capitalist" is used here as antithesis of "socialist". It does not mean government on behalf of capitalistic class—an attribution that may or may not be justified according to the conditions. It does mean a government the activities of which are in part determined and in part limited by the substantial presence of private economic enterprise. The distinction between capitalistic government and Socialist government is a matter of degree. A government is here named socialist not because the party in power is socialistically minded—it will still be capitalistic if it meets the above-mentioned condition—but because the control of government over the economic life goes so far as to involve the public ownership and direction of the main instruments and agencies of production. Practically all modern capitalist governments are socio-capitalist, in the sense that private economic enterprise is to a considerable but greatly varying extent supervised and limited by them.<sup>2</sup>

1. *Akadasi Padhan v. State of Orissa*, 1963 S. C. 1047 ; *Excel Wear v. Union of India*, 1979 SC 25 (36).

2. Mac Iver: *The Web of Government*, p. 157.

Marxism-Leninism, frequently known as Communism is a kind of secular religion, preaching the necessity of class warfare, the dictatorship of the proletariat and the concentration of near total power in a tightly structured party that is supposedly the vanguard of the revolutionary masses. Communism is dogmatic in its determination to abolish private property and nationalize the means of production as the first steps towards achieving its ultimate goal, the classless society.

Social democracy is the most liberal version of democracy. It accepts a multi-party political system and believes in gradual peaceful means of reaching its socialist goals. In practical terms, this has meant that social democrats have concentrated more on alternating what they regard as hardships created by capitalist economies (unemployment, salary and wage inequities) than on directly restructuring societies according to a collective blue print. States ruled by Social democrats are generally mixed economies combining elements of free enterprise competition with state ownership or direction of key industries.<sup>1</sup>

The Social Democratic Government set up by our Constitution envisages a Parliamentary process and guarantees human rights and fundamental freedoms. The State can not take away or abridge these rights and freedoms.

#### 4-15. Socialist Government.

**Socialist Government.** A socialist government, while exercising ownership over the means of production may admit the private incentive of a graduated wage-and-salary scale and leave the distribution of economic goods to be determined by consumer demands and variations of consumer incomes. It may also allow private trading enterprise on a larger or smaller scale. The most inclusive range of socialist Government would fully organize distribution as well as production, apportioning goods on the basis of needs rather than of economically evaluated services. Socialism then becomes communism, in the proper sense of that word.<sup>2</sup>

Between 1947, when the Report of the Advisory Planning Board was published, and December, 1952, when "The First Five Year Plan" was transmitted to the Prime Minister, two historic documents had made their appearance. The first of these was the Industrial Policy Resolution of April 6, 1948; the second was the Constitution of the Republic of India, adopted on November 6, 1949. A third landmark, the acceptance of the "Socialist Pattern of Society" was to come later. Whilst the Resolution dealt primarily with the policy in the industrial field, the general aim was set out in Paragraph II of the Resolution :

"Any improvement in the economic conditions of the country postulates an increase in national wealth: a mere re-distribution of existing wealth would merely mean the distribution of poverty. A dynamic national policy must, therefore, be directed to a continuous increase in production by all possible means, side by side with measures to secure its equitable distribution. In the present state of the nation's economy, when the mass of the people are below the subsistence level, the emphasis should be on the expansion of production, both agricultural and industrial: and, in particular, on the production of capital equipment, of goods

1. *Time*, March 13, 1978, p. 8.

2. MacIver: *The Web of Government*, p. 157-58.

satisfying the basic needs of the people, and of commodities, the export of which will increase earnings of foreign exchange.”

The third paragraph, whilst emphasising the role of the State in initiating new enterprises, also argued that, “private enterprise, properly directed and regulated, has a valuable role to play.”

Independent India's industrial policy was first announced in 1948. This envisaged a mixed economy with an overall responsibility of the Government for planned development of industries and their regulation in the national interest. While it reiterated the right of state to acquire an industrial undertaking in public interest, it reserved an appropriate sphere for private enterprise.

In 1954, Parliament declared that the broad objective of economic policy should be to achieve a ‘socialist pattern of society’ under which the basic criteria for determining the lines of advance would be social gain and greater equality in incomes and wealth and not private profit. The Second Five Year Plan (1956-57 to 1960-61), therefore, sought to promote a pattern of development which would ultimately lead to the establishment of a socialistic society in India. In particular, it stressed that the benefits of economic development should accrue more to the relatively less privileged section of society, and there should be a progressive reduction in the concentration of incomes, wealth, and economic power. The policy was revised in 1956 following Parliament's acceptance in 1954 of a socialistic pattern of society as the national objective. Under the revised policy, industries specified in Schedule A are the exclusive responsibility of the State, industries in Schedule B are to be progressively State-owned, but private enterprise is expected to supplement the efforts of the State in these fields. Future development of industries falling outside the two Schedules would, in general, be left to private enterprise. Notwithstanding this demarcation, it is always open to the State to undertake any type of industrial production.

The expression “Socialist” was introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the objects and reasons it was said: The question of amending the Constitution for removing the difficulties which have arisen in achieving the objectives of Socio-Economic revolution which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the attention of the Government and the public for some time. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism to make the directive principles more comprehensive.

By Constitution (42nd Amendment) Act, the Preamble was amended and in place of the words Sovereign Democratic Republic, the words “Sovereign Socialist Secular Democratic Republic” were substituted. The industrial policy of the government was thus made a part of the Preamble.

In *Nakara v. Union of India*<sup>1</sup> Desai, J. said: “The principle aim of socialist state is to eliminate inequality and status and standards of life. The basic frame work of socialism is to provide a decent standard of life to the working people and specially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian Socialism.

Mr. Justice Chinnappa Reddy, in his inaugural address in the Seminar on "Socialism, Constitution and the Country today" goes straight to Marx. He says:

"All socialistic roads must lead to Karl Marx, who was the first to provide a scientific, logical, coherent, systematic, history-based socialist theory for the benefit of the emerging working class movement. He replaced the vague dreams of earlier socialists with the laws of history and science and fashioned tools for waging the struggle to end all class-struggles.

"It should be obvious that one cannot conceive of a Socialist State where the right to work, the right to a decent wage and the right to education, particularly scientific education are not guaranteed. It is equally obvious that we cannot conceive of a Socialist State where what is sought is not the elimination of private property and ownership and the complete control of all the means of production of wealth and not mere prevention of concentration of wealth and means of production. Nor is it possible to contemplate a socialist state where workers are not involved and are not required to participate in decision-making managerial and planning activity. Unless the basic tenets of socialism are duly and appropriately incorporated into the Constitution it is difficult to contemplate our Constitution as the Constitution of a socialist State. The mere incorporation of the word 'Socialist' in the preamble of the Constitution does not make it a socialist Constitution. It may be, and indeed it is, a liberal Constitution, but liberalism and scientific socialism are far removed from each other. Liberalism is of the past. It was a useful enough ideological weapon in the struggle of the bourgeoisie against feudal forces. It may have its own limited uses even now, but it is not a sharp enough or a scientific weapon to be successfully employed in the proletariat's evolutionary struggle against capitalist forces."

Surely the idea behind the Forty-Second Amendment was certainly not to establish a communist state in our country. Are all these amenities not available in countries which are not designated as "Socialist States."

#### 4-16. *Justice.*

The Constitution secures to all the citizens Justice (social, economic and political), Liberty of thought, expression, belief, faith and worship, and also Equality of status and of opportunity.

All ideas of justice, all varieties of thinking and feeling regarding justice, have something in common. First, such ideas exist everywhere as a distinct category of ideas. Second, the term justice or its approximate equivalent exists everywhere. Third, human longing for justice is so universal a factor that no one in public life can neglect presenting his acts as just. And, fourth, there is the negative indication that we can easily construe an action which appears *not* just, which is unjust from every point of view. A few observations may be added here regarding the third and the fourth of these points. Dictators of old and of recent times have constantly appealed to the sense of justice, no less than have popular governments. True, in so doing they have often falsified the facts. But that they took such great pains to persuade people of the justice of their policies testifies to the tremendous importance of the sense of justice. Caesar tried to justify his crossing of the Rubicon by accusing Pompey of the breach of the Roman Constitution, William the Conqueror his crossing of the Channel by reference to his feudal rights. To choose one of many examples from recent history, before invading Ethiopia in 1935 Mussolini ended his radio speech of October 2 with these words: "It is the cry of Italy which goes beyond the mountains and the seas out into the great world. It is the cry of justice and of victory." It was the same with

Hitler's speeches in support of his actions against Austria, Czechoslovakia and Poland or versus the Jews.<sup>1</sup>

Among the proper ends of state and governments justice has been given a high, if not top, rank at all times. Two axioms have been generally accepted without question first, that government's own actions ought to be just; second, that governmental institutions, such as law courts, ought to ensure the preservation of justice.<sup>2</sup>

As a lawmaker the government stands under the postulate that all its actions ought to be just. Ideas of legal justice hence appeared on two levels according to whether they referred to the making of laws or to their application, with the term justice occurring in both, but in a different setting; the laws laid down by governments ought to be just laws; once laid down, they ought to be administered justly. The lawyer's minds have been fixed on the second aspect, the political scientists' on the first. But the basic question is the same for both : what is just, what is unjust ?<sup>3</sup>

To give an illustration of the variety of conditions, or states of affairs, which people regard as standard goals in their ideas of justice either for the distant future or for the present moment, a few "ideal types", or characteristic patterns, of creed will be briefly sketched. Thus we have, says Brecht :<sup>4</sup>

1. The equalitarian, who places equality highest in matters of justice and derives from this ultimate ideal his standards of justice. There is a good deal of evidence that a certain segment of equality is contained in every idea of justice. But the equalitarian wants more. He wants the whole thing. There are many kinds of equalitarian, however, depending on what they desire to make equal; wealth or income, happiness, freedom, opportunity, or what else. And further subdivisions are necessary. If, for instance, equality in wealth is the ideal, we must distinguish whether equality is desired on a per capita basis, or according to need, or according to work and if the latter, whether quantity or quality of work is to decide. Earlier socialism held the according-to-need ideal; the Soviet Constitution of 1936, however, incorporated the according-to-work standard, which leads to different results. We must also distinguish whether equality is sought on a world-wide basis or on a national or racial basis, and the like. All these propositions are actually incompatible with one another. What is justice under the one is injustice under the other.

2. The libertarian, who tends to measure everything by the yardstick of liberty. He will ardently oppose as unjust steps intruding on liberty which the equalitarian would welcome as just, and inversely.

3. The authoritarian, who regards leadership as a principle of highest value. To follow leadership is just, to counteract it, unjust.

4. The majority worshipper, who holds that whatever the majority decides is the highest value to be accepted by everyone. To follow the majority will is just, to oppose its execution is unjust. It is not leadership that arouses his enthusiasm but the consent of the people through the majority.

5. The hedonist, who looks for individual happiness or for the greatest happiness of the greatest number. His ideas would oppose those of the majority worshipper whenever the majority does not act for this highest end. The

1. Brecht: *Political Theory*, p. 389.

2. *Ibid.*, p. 136.

3. *Ibid.*, p. 137.

4. *Ibid.*, p. 151.

many different conceptions of happiness, from material egoism to immaterial altruism and transpersonalism, split this category into as many subdivisions.

The noun "justice" is itself qualified with different adjectives, and the result is often used to name different kinds of justice. These distinctions also serve to show the range of its applications, the many objects with which it is thought to deal. Man and his actions can be considered in relation to other men as individuals, or to the family, or to society at large and its laws, and then justice is characterized as commutative, domestic, social, or legal. We may look at society in its relations with its members, its law-breakers, its economy, and with other states, and speak accordingly of distributive justice, of criminal or corrective justice, of economic justice, and of international justice.<sup>1</sup>

Common usage continues to treat "justice" as denoting some of the greatest of human needs and worthiest of social enterprises. Philosophers miss the reference of the term insofar as they fail to observe the occasions when it becomes relevant to the concrete experience and discourse of individuals and social groups. No concept would be adequate that identified justice with a merely ideal relation or static condition or list of preceptual standards. In common experience, men turn to the vocabulary of justice when they confront a real or imagined instance of injustice. The ethical and biological functions of justice become evident in the sense of injustice.<sup>2</sup>

#### 4-17. *Sense of Injustice.*

'The sense of injustice is an indissociable blend of reason and empathy, evolutionary in its manifestations. It is not mere intuition or some mystical law-instinct (*Rechtsgefühl*). Without reason, the sense of injustice could not identify the transactions that provoke it, nor could it serve the interests of social utility; without empathy it would lack its emotive heat and its capacity to impel men to act. It derives logical and social justification from its efficacy for it succeeds precisely to the extent that in any given case the relevant circumstances have been understood, felt, and appreciated. It is an immanent working factor not only within the institutions of law but throughout the cosmos of interpersonal transactions.

The sense of injustice is the equipment by which a human being discerns assault, recognizes oppression of another as a species of attack upon himself, and prepares defense. Among its facts, which should not be taken as categories, are the demands for equality, desert, human dignity, conscientious, official behaviour including due process of decision, confinement of government to its proper functions, and fulfilment of the common expectations of the given society. The sense of injustice does not provide a formula to relieve men of the duty of deliberation and decision nor does it deprive them of their corresponding freedoms. Generally, it assists the decisional process rather by barring a course that is wrong than by selecting among courses that are right.

In this perspective, "justice" means the active process of preventing or remedying what would arouse the sense of injustice. Thus the experience of the sense of injustice is itself a dramatic species of social transformation, because it incites men to join with one another in perceiving danger, in

1. Bird : *The Idea of Justice*, p. 5.

2. *International Encyclopedia of the Social Sciences*, Vol. 8, p. 346.

resisting it, and in exulting over an achieved success—all of which are public acts of solidarity. Justice then is more than a static equilibrium or a quality of the human will; it is, as common usage has always hinted, an active process or agenda or enterprise. The meaning of the term comes alive whenever one confronts injustice and “does” justice.<sup>1</sup>

#### 4-18. *Social Justice.*

According to Rawls “the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation.” By major institutions he meant the political constitution and the principal economic and social arrangements. Taken together as one scheme, the major institutions define men’s rights and duties and influence their life-prospects, what they can expect to be and how well they can hope to do. This basic structure contains various social positions and men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favour certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men’s initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply. These principles, then, regulate the choice of a political constitution and the main elements of the economic and social system. The justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society”.<sup>2</sup>

The social challenge that faced the makers of our constitution arose from a combination of two recently emerged but fundamental social beliefs. The first was that men and women, were not to be denied the opportunities of personal happiness, to be achieved not as others thought fit but as they wished it. The second was that all the citizens were entitled to the active protection of the State against the ills of poverty, disease and old age. The distribution of wealth among all members of society had become a human right. ‘This social change’ says Scarman, ‘is currently a most formidable threat to the English legal system as we know it today. Social justice, by which today’s society means justice in depth not only penetrating and destroying the inequalities of sex, race and wealth but also supporting the weak and the exposed, is believed by some to be beyond the reach of the traditional combination of common law rule and equitable relief supplemented where necessary, by statutes; it appears to need a new law, new principle, new remedies, new machinery and new men’.<sup>3</sup>

The inability to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. These things affect the worth of liberty. Liberty and the worth of liberty was distinguished by Rawls as follows :

1. *International Encyclopedia of the Social Sciences*, Vol. 8, p. 347.
2. Rawls: *A Theory of Justice*, p. 7
3. Scarman: *English Law...The New Dimension*, p. 28-29.

“Liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied. But compensating for the lesser worth of freedom is not to be confused with making good an unequal liberty. Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This defines the end of social justice.”<sup>1</sup>

To offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom what is the value of freedom?

‘What troubles our consciences is not, the belief that the freedom that men seek differs according to their social or economic conditions, but that the minority who possess it have gained it by exploiting, or, at least, averting their gaze from the vast majority who do not. They believe, with good reason, that if individual liberty is an ultimate end for human beings, none should be deprived of it by others; least of all that some should enjoy it at the expense of others. Equality of liberty, not to treat others as I should not wish them to treat me; repayment of my debt to those who alone have made possible my liberty or prosperity or enlightenment; justice, in its simplest and most universal sense—these are the foundations of liberal morality.’

According to Honore, the principle of Social Justice consists in two propositions. The first is the contention that all men considered merely as men and apart from their conduct or choice have a claim to an equal share in all those things, or advantages which are generally desired and are in fact conducive to their well-being. By this he meant such things as life, health, food, shelter, clothing, places, to move in, opportunities for acquiring knowledge and skill, for sharing in the process of making decisions, for recreation, travel etc.<sup>2</sup> The second proposition is that there is a limited set of factors which can justify departures from the principle embodied in the first proposition. This is to say that there are a limited number of principles of discrimination and that the claim of men to an equal share in all advantages can fairly be modified, restricted or limited by only two main factors. These are the choice of the claimant or the citizen on the one hand and his conduct on the other.

Another variety of justice corresponds approximately to Aristotle's distributive justice. This rests on the principle that it is fair to reward others according to their merits or deserts. The first thing to ask in this connection

1. Rawls: *A Theory of Social Justice*, p. 204-5.

2. A. M. Honore: *Social Justice in Essays in Legal Philosophy* edited by Summers p. 62-63.



„, how is merit to be assessed? A very clear example of reward according to merit would be a case in which payment is made to someone according to the quality or value of the work he has done. In this simple case at least merit depends on performance; in other words, on the claimant's actual conduct.

It is fair to reward others according to their merits or deserts. It may be said that desert can equally depend on demerit, or bad conduct, in that the principle of justice according to desert includes also the principle that those who have behaved badly or harmfully should be punished according with the extent and character of their wrongdoing. If this is accepted, the core of the desert principle is the notion that men are responsible for their actions and that it is fair for society to reward them according to their responsibility.<sup>1</sup> So far it has been assumed that the criterion of desert is conduct, that is, what the citizen who claims to be treated according to desert has actually done. But in fact this is only part of the notion of desert. Thus it would be fair to appoint to a vacant post the person best qualified for it, even if the assumption of the claimant's qualifications was based not on his past performance but on his ability and promise. The candidate who failed to secure the appointment could not complain of unfair treatment in such a case, and the best qualified candidate would properly be said to deserve the appointment. It seems clear, however, that where, as here, performance is not the basis of desert, potential performance is.<sup>2</sup>

In dealing with the question of justice according to need the principle involved is one by which it is fair to allocate advantages, and to recognize the claims of citizens according to their needs. The concept of need is a somewhat complex one. What it presupposes is that there are certain advantages such that, if they are not satisfied, no existence at all or at any rate no decent or complete existence is possible. Without life no existence at all is possible and without adequate food, shelter and clothing no decent existence is possible. Nor is this the limit of the advantages which people may be said to need. The boundaries of need shift from time to time with changes in the social and economic conditions of society and in the exigencies which a decent or complete existence is thought to postulate. What is at one time a luxury becomes at another time a necessity and need.<sup>3</sup>

The wider principle of Social Justice consists simply in the claims of all men to all advantages and to an equal share in all advantages which are commonly regarded as desirable and which are in fact conducive to human well being. The basic demand for equal treatment in all respects is not confined to food or material things but extends to opportunities for entertainment, recreation, education travel etc.<sup>4</sup>

The principle of social justice resides in the idea that all men shall have equal claims to all advantages which are generally desired and which are in fact conducive to human perfection and human happiness. This has two main aspects; first, the equalization of human conditions as far as capital assets, human and inanimate, that is, the prerequisites of a good life are concerned. This involves equal claims to the necessities of life, to health, food, shelter etc. and also equality of opportunity for both work and enjoyment. The second aspect of the principle of social justice consists in the

1. Honore in *Sumner's Essays in Legal Philosophy*, p. 72.

2. *Ibid.*, p. 73-74.

3. *Ibid.*, p. 78.

4. *Ibid.*, p. 82-83.

principles of non-discrimination and conformity to rule. These ensure that what has been accorded under the first heading will not be taken away subsequently. There are some exceptions to the principle of social justice, in particular to the principle of non-discrimination. These exceptions fall under subordinate principles of justice such as the justice of transactions, justice according to desert, justice according to choice and justice according to need. There are no further exceptions to be found.<sup>1</sup>

Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in and public functionary like a magistrate under Section 133 Cr. P. C. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the condition of developing countries and obligated by Article 38 of the Constitution. This brings Indian Public law, in its processual branch, in line with the statement of Prof. Kojima.<sup>2</sup> "The urgent need is to focus on the ordinary man-one might say the little man....."<sup>3</sup> Access to Justice by Cappelletti and B. Garth summarises the new change thus :

"The recognition of this urgent need reflects a fundamental change in the concept of "procedural justice".....The new attitude to procedural justice reflects what Professor Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure", the paramount concern is increasingly with "social justice", i. e., with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people. While the implications of this change are dramatic-for instance, insofar as the role of the adjudicator is concerned it is worth emphasizing at the outset that the core values of the more traditional procedural justice must be retained. "Access to justice" must encompass both forms of procedural justice."

#### 4.19. Equality of opportunity aspect of Social Justice.

Equality of opportunity is the essence of social justice, because we mostly believe, not that all advantages should be equally distributed to all men, but rather that provided that all men have equal opportunities, distribution should be made according to desert. Thus we do not generally think that Social Justice requires that the income of all should be equal. The formula of equal claims should on this view be abandoned in favour of the principle of equal opportunities.

But what exactly is meant by equal opportunities ? Those who argue along these lines probably have in mind such facilities as schools, hospitals, etc. that is, the provision of opportunities for acquiring knowledge, skill, health, etc. which will conduce to good work and to the enjoyment of life. The equality of opportunity envisaged is an equality of opportunities for acquiring that bodily and mental equipment which, so far as the citizen is capable of acquiring it, will enable him to compete fairly with his fellow-men. But fair competition and fair opportunities in this context can only exist if each citizen has an equal claim to those sources of opportunity, such as instruction, books, medical attention, sport, space, radio and television facilities, etc., which will put him on an equal footing with his fellow-men, so far as he is capable of profiting from them. There is, therefore, no

1. Honore *Social Justice in Essays in Legal Philosophy*, p. 91.

2. *Access to Justice...A World Survey*, Vol. 1, by M. Cappelletti and B. Garth, p. 68.

3. *Municipal Council v. Shri Vardichan*, 1980 (4) SCC 162 (170-71).

inconsistency between the assertion that each man has an equal claim to all advantages, subject to discrimination on the basis of desert, and the principle of equality of opportunity, if it is interpreted in the way suggested by Honore.<sup>1</sup>

#### 4-20. *Economic Justice.*

In the years after the second world war economic development became a central objective of the countries emerging from colonial rule or semi-colonial status, and much of the thinking and activity of international bodies was couched in terms of the problems of assisting newly developing countries in their efforts to catch up.

The concept of economic development was not sharply defined but, as used for example by the International Bank for Reconstruction and Development, it meant an advance in national and per capita income, increased industrial and agricultural production and productive capacity, increased productivity of labour and a rising level of living for the people in the present or the future.<sup>2</sup>

Economic Justice would mean the development of a more productive economy which would lift the Indian people from extreme poverty to a level of living closer to that of more prosperous and developed countries, to increase the real income of the people sufficiently rapidly to maintain stability in the society and to achieve 'socialist pattern of society,' which means that extremes of wealth would be reduced, centres of private power would be eliminated or not allowed to develop, and the machinery of the state would be used for such economic purposes as might be appropriate in a democratic system.

#### 4-21. *Political Justice.*

Political justice refers to the use of the judicial process for the purpose of gaining (or upholding or enlarging) or limiting (or destroying) political power or influence. Political justice usually involves the courts, which may be invoked either by public officials or, in those societies which permit open competition for political power, by private individuals. The party invoking the judicial arm must present its demands in a form susceptible of legal determination. This party's allegations in regard to facts must be open to incrimination and proof under the specific legal system involved. These allegations may relate to intrinsically political acts or to common crimes in which the criminal is charged with political motivation, for example, bank robbery to finance revolutionary activity.<sup>3</sup>

#### 4-22. *Liberty.*

There is the liberty of a man in the capacity of an individual person, his personal liberty, or, as we may also say, his civil liberty.

"If there is any principle of the Constitution", said Holmes J., in his dissent in *U. S. v. Schwimmer*,<sup>3</sup> "that more imperatively calls for attachment than other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. This dissent became the law where *Schwimmer* case was overruled by *Geroreard v. U. S.*

1. Honore : *Social Justice in Essays, in Legal Philosophy* p. 90

2. *History of Mankind*, Vol. 5, p. 710.

3. *International Encyclopedia of Social of Sciences*, Vol. 12, p. 246.

"Next to my civil liberty, there is my liberty in the capacity of a citizen : My liberty as a member of the public and a part of the legal association : my public or political liberty. Government is not external : it is in us, or springs from us ; and we regard political liberty as positive in its nature. It is a liberty not of curbing government, but of constituting and controlling it; constituting it by a general act of choice or election, in which we all freely share according to our capacities. Besides the civil liberty which belongs to me in my capacity of an individual person, and the political liberty which belongs to me in my capacity of a citizen and a member of the public, there is also a third form of liberty in the area of the State. This is the economic liberty which belongs to me in my capacity of a worker, whether with hand or brain, engaged in some gainful occupation or service and it may be argued that the conception introduces an unnecessary distinction."<sup>1</sup>

"The three forms of liberty", according to Barker, "may quarrel with one another. The liberty of the citizen in the political sphere may quarrel with that of the individual person in the civil sphere; for example, the enjoyment of intellectual freedom for the expression of thought and belief, which is one of the great articles of civil liberty, may come into conflict with a parliamentary majority, acting in the name of political liberty, if such a majority seeks to lay down conditions adverse to the free expression of thought and belief, on the ground that it is seditious and calculated to excite disaffection against the government or to promote hostility between classes. Similarly the liberty of individual persons in the civil sphere may quarrel with that of the worker in the economic sphere; and the worker's enjoyment of some share in determining his wages and the conditions of his work may be challenged, as in past it was, by a claim on the other side to the enjoyment of a freedom of contractual action which warrants the employer in practically dictating the terms of wages and conditions of work. Here political liberty can, and has, come to the rescue of economic liberty; but is also possible that a parliamentary majority acting in the name of political liberty; may seek to impose conditions adverse to the enjoyment of economic liberty as that liberty is conceived and claimed by the workers and their organizations."<sup>2</sup>

#### 4.23. Civil Liberty

"Civil Liberty", as commonly used, is not a technical, precise term but a loose one denoting the personal rights and freedoms that are or ought to be respected by government. The phrase is not quite so broad as "liberty". It does not apply where there is no government; it does not embrace those areas of private option where the law can play no part, as when a man freely chooses to be a fool, or a gentleman, or a knave, nor can the term be used very meaningfully in connection with such a concept as the "right of revolution", which is by nature a nonlegal privilege. But in its broadest usage the term is applicable to all those many claims of right that involve an actual or potential legal nexus between the individual and government.<sup>3</sup> Civil liberty can be thought of either negatively, as the individual's right not have something done to him, or positively, as his right to have something done for him—for example, as the right against state interference with the publication of a political pamphlet or as the right to be provided with the facilities for publishing it. The negative category is the traditional one. But the truism that under lies the idea of positive liberty should not be overlooked : the freedom to read is

1. Barker: *Principles of Social and Political Theory*, p. 146-47.

2. *Ibid* p. 149.

3. *International Encyclopedia of Social Sciences*, Vol. 3, p. 307.

meaningless if no books are available. Negative liberties can themselves be further subdivided into rights against interference by government and rights against interference by private individuals or groups. Again the former category is the more traditional, but against the less orthodox view merits a word by way of emphasis. In order to be really free to speak, a street-corner orator may need not only the assurance that the police will leave him alone but also the assurance that they will protect him from the angry reactions of his audience, that the state will “hinder hindrances” to his freedom.

Rights against government are sometimes still further divided into three types: political rights (those bearing on the political process, such as the right to vote or to engage in political controversy), economic rights (such as entrepreneurial freedom or the right to practice a profession), and private rights (which is a catch-all term meant to cover all rights that are neither political nor economic). Obviously these are imperfect categories, since they are not always mutually exclusive (is freedom of artistic expression a private right, or can it be said to bear indirectly on the political process?) but they do represent distinctions that have been drawn in practice and in the literature, and they have, therefore, a loose pragmatic value.

Finally, each of these three classes of rights against government subsumes two kinds of rights, the “substantive” and the “procedural”. The substantive civil liberties are those regarded, in some degree, as ends in themselves; procedural rights are those having to do with the way in which government must proceed in dealing with substantive liberties.<sup>1</sup>

#### 4.24. *Religious Liberty.*

Religious liberty is not an isolated reality. It exists, or is denied, in the midst of a complex of institutions, attitudes and practices. It is inseparable from measures of liberty in general and from certain specific liberties, such as those of free expression and association. Religious liberty is supported by related liberties; the effort to secure religious liberty is, both in history and in contemporary society, a force working largely towards the associated liberties. As Sturzo observes :

“One liberty never stands alone; it must form part of a system or it is not liberty”. Harrington realized, in the seventeenth century : “without liberty of conscience, civil liberty cannot be perfect; and without civil liberty, liberty of conscience cannot be perfect.” So remarks a distinguished writer upon the contemporary scene.<sup>2</sup>

It is impossible to grant freedom of worship without granting freedom of the press, freedom of assembly. Religious liberty cannot exist without civil liberty and *vice versa*.<sup>2</sup>

Religious liberty has three aspects (1) individual autonomy in the choice of a creed ; (2) autonomy of the religious body in its collective activities ; (3) legal equality of religious bodies.<sup>3</sup>

From the general nature of rights, and the relation in which they stand to the State and the individual, we may now turn to consider the principles of their distribution. The principles of distributive justice are the procedural

1. *International Encyclopedia of Social Sciences* Vol. 3 pp. 307-308.

2. Bates: *Religious Liberty*, p. 343.

3. *Ibid.*

4. *Ibid.*, p. 301.

rules which justice requires that law should follow in allocating and distributing rights among the members of the State. 'If justice be regarded' says Barker "as an order of society directed to the end of fostering and encouraging the highest possible development of all the capacities of personality in all its members, these procedural rules required by justice will be rules which follow from that order and are dictated by that end ; and they will thus be ultimately derived from the ultimate value of personality and the development of its capacities. Again, if justice be regarded as the primary social and political value—though grounded itself on the ultimate moral value of personality and the development of its capacities—then the procedural rules required by justice may be considered as the secondary social and political values, and we may say, 'First Justice, and then the rules of Liberty, Equality, and Fraternity. which follow on, and from Justice.'"<sup>1</sup>

#### 4.25. *Equality*

"The principle of Equality" according to Barker "means that the State treats all legal persons as equal in its presence or, as we say, 'in the eye of the law.' It will not assign higher and lower grades of legal personality. One moral personality matters as such as another ; and the assignation of legal personality, which follows from and is based on the fact of moral personality, will reflect the fact on which it is based. Our old English forefathers held that 'people and law went by ranks' : today we recognise (though perhaps imperfectly even yet) that people and law must always go by the rule of equality. But this legal equality is by its nature something different from general or absolute equality. It is a legal equality of legal persons within the state. Outside the State and outside the area of legal persons—that is to say, in the social or extra-legal sphere—there may still exist much inequality, alike in personal capacity, in social status, and in economic resources. How far the State can tolerate some of this inequality in the social or extra-legal sphere, and more especially how far it can tolerate inequality of economic resources, without offending against its own principle of the equality of legal persons within itself and in its own sphere is a grave question of our times which leads to a clash of conflicting arguments. It is true, on the one hand, that the rule of Equality, as recognized and applied by the State, means equality only within the State, and therefore only with respect to the standing of legal persons in and under its scheme. It does not involve or mean equality in the social or extra-legal sphere : it is legal, and not social, equality ; it is equality in terms of capacity for the enjoyment and exercise of rights, but not in terms of capacity for the enjoyment and exercise of all the multitudinous forms of social activity. On the other hand, it is also true that effective legal equality demands some measure of social equality. The State guarantees men equal rights in its polling-booths and its courts of law. But can those rights be effectively enjoyed on equal terms unless personal capacity is made more equal by an open system of State education ; unless economic resources are made more equal by a further system of State regulation of the general national income ; and unless general social position, so far as it depends on personal capacity and economic resources, is made more equal in and by the process of creating greater equality both in capacity and in resources ? Yet more equality, in all these respects—personal capacity, economic resources, and social position—is only a means, and can be enforced by the state only in so far as it is a means, to the securing of effective legal equality. The increase (for example) of equality in respect of economic resources is not an end in itself, but a means to effective legal equality ; and the amount of the increase

1. Barker: *Principles of Social and Political Theory*, p. 139-140.

imposed by the State, in the act of determining by how much resources are to be made more equal, will accordingly depend on the end which it is intended to serve.”<sup>1</sup>

#### 4.26. *Equality interpreted in different senses*

There are six general senses in which we may speak of equality ; namely, (1) Spiritual (2) Natural, (3) Civil, (4) Political, (5) Social, (6) Economic.<sup>2</sup>

Aristotle and Plato while not perhaps explicitly repudiating the idea of spiritual equality, laid no emphasis upon it. In fact, inasmuch as they held that individuals had an existence as persons only as members of the State, their intrinsic worth as persons could hardly have been clearly recognised. Thus, while the physical and mental differences between individuals were clearly recognised and repeatedly drawn, little or to no mention was made of the essential spiritual likeness which underlies these differences. The natural result of this was that these mental and physical differences were so emphasized as to divide men into classes almost generically distinct.<sup>3</sup>

The constitution has abolished inequality based on caste system and there is now complete spiritual equality. A Brahman has no rights greater than the rights enjoyed by a Sudra.

According to the theory of natural equality, strictly conceived, all men and women are naturally, that is when born, substantially and potentially equal, physically and mentally. Whatever inequalities subsequently appear must, if we accept a doctrine of natural equality, be conceived to be due to differences in education and other objective conditions of life.<sup>4</sup> Thus says Godwin<sup>5</sup> : “In the uncultivated state of man, diseases, effeminacy, and luxury were little known, and of consequence the strength of every one much more nearly approached to the strength of his neighbour. In the uncultivated state of man the understanding of all were limited, their ideas and their views nearly upon a level.” To the following effect speaks also Hobbes :

“Nature has made men so equal, in the faculties of the body and mind ; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind than another, yet when all is reckoned together, the difference between man and man is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend as well as he. For as to strength of body, the weakest has strength enough to kill the strongest either by secret machination, or by confederacy with others that are in the same danger with himself. And as to the faculties of mind, setting aside the arts grounded upon words, and especially that skill of proceeding upon general and infallible rules, called science ; which very few have, but in few things ; as being not a native faculty, born with us, nor attained, as prudence, while we look after somewhat else, I find yet a greater equality amongst men than that of strength. For prudence is but experience ; which equal time equally bestows on all men, in those things they equally apply themselves unto. That which may perhaps

1. Barker : *Principles of Social and Political Theory*, p. 140-142.

2. Willoughby: *Social Justice*, p. 35.

3. *Ibid.*, p. 36.

4. *Ibid.*, p. 40.

5. Godwin : *Political Justice Book 2*, Chap. 4.

make such equality incredible, is but a vain conceit of one's own wisdom, which almost all men think they have in a greater degree than the vulgar ; that is, that all men but themselves, and a few others, whom by fame or for concurring with themselves, they approve. For such is the nature of men, that howsoever they may acknowledge many others to be more witty, or more eloquent, or more learned ; yet they will hardly believe that there be many so wise as themselves ; for they see their own wit at hand and other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contended with his share."<sup>1</sup>

Adam Smith, in his *Wealth of Nations*, says upon this point : "The difference of natural talents in different men, is, in reality, much less than we are aware of, and the very different genius which appears to distinguish men of different professions, when grown up to maturity, is not upon many occasions so much the cause as the effect of the division of labour. The difference between the most dissimilar characters, between a philosopher and a common street-porter, for example, seems to arise, not so much from nature, as from habit, custom, and education. By nature a philosopher is not ingenious and disposition half so different from a street-porter as a mastiff is from a grey hound, or a greyhound from a spaniel, or this last from a shepherd's dog."<sup>2</sup>

When we consider that all men are rational beings and moral potentialities, and thus fundamentally equal, one cannot escape from the conclusion that a perfect regime would be one in which all individuals would have an opportunity for the development and exercise of those capacities which, from the highest ethical stand point, should be cultivated and employed. And if this be the ethical ideal, it necessarily follows that, so far as it lies within our power, we should strive for its attainment. The individual, as a moral being will be recognized to have the right to demand that so far as it lies within human power, society shall be so organized as to give to all a due opportunity for happiness and growth.

By civil equality is meant legal equality, the possession of equal rights in the sphere of private law by all the members of a given body politic. Such an absolute and universal equality has never been attempted in any system of jurisprudence, nor would it be possible of establishment without leading to the greatest evils. The reason for this is that not all individuals, irrespective of age or sex, are equally capable either of putting civil rights to their proper use, or of satisfactorily fulfilling the corresponding civil obligations. Thus in all communities, even in those where the doctrines of freedom and equality have received the widest acceptance, we find minors released from many of the legal obligations that are placed upon adults, and correspondingly, deprived of privileges or capacities which their majors enjoy. The same is true as to the respective legal competences of men and women, of persons *compos mentis* and persons *non compos mentis*. Where these distinctions are based upon actual differences in personal capacity, and have for their aim the securing of

1. Hobbes: *Leviathan*, Chapter 13, p. 63.

2. Willoughby: *Social Justice*: Adam Smith: *Wealth of Nations*, Book 1, Chapter 2, p. 42-43.

3. Willoughby: *Social Justice*, p. 46-47.

4. *Ibid.*, p. 51.



the greatest aggregate justice rather than the creation of arbitrary distinctions, their existence is fully justified. Though often spoken of as such, civil equality cannot be considered an ideal of justice. The nearest we can come to framing a rule of justice in this respect is to say that there should be substantial equality as to all individuals who are conceived to be, from an intellectual standpoint, able to exercise a sound discrimination in all matters with which the private law has to deal ; and that exceptions to this rule should be made solely for the sake of securing greater legal protection to those who are not thus fully competent.<sup>1</sup>

A feature of modern systems of jurisprudence that is closely allied to, and in fact often confused with, the idea of civil equality, is the recognition of an equality of all persons before the law. By this is meant that when persons are brought before a court of justice for the interpretation or enforcement of their respective rights, the judgments rendered are to be determined wholly by the facts and law involved, and hence irrespective of the social, economic, political, or moral standing of the parties litigant. At first thought, this may seem unjustifiable. When, however, the true nature of law, and the object sought in its enforcement, is considered, it is seen to be eminently just.<sup>2</sup>

By political equality is meant an equality of right to share in the direction of public affairs, either by way or holding office, or by selecting those who do.<sup>3</sup> When an individual claims a political right, he is asking for an authority to participate in the making and executing, not simply of the laws by which he himself is to be governed, but of the laws which are to control the actions of others as well. Whatever may be the essential basis of the State's right to be, a people has the undoubted right to demand as efficient a government as can be obtained. If this be so, no individual can claim a political authority or privilege as a right, save as he can demonstrate that he possesses both the capacity and the disposition properly to exercise it when obtained. The rule of justice here to be laid down is that rights should be distributed according to the capacities and the dispositions of the individuals who are to exercise them.<sup>4</sup>

In all nations where political rights are liberally granted, the attainment of a certain age is accepted as evidence of a mental capacity sufficient for the casting of an intelligent vote, or for the proper exercise of the duties which attach to a public office. Of course, however, no one believes that all citizens are not so qualified before attaining the given age, or that they are necessarily so qualified when they have attained it.<sup>5</sup>

Nor does the general diffusion of political rights necessarily lead to an equal diffusion of political powers. As Stephen says "legislate how you will, establish universal suffrage, if you think proper, as a law which can never be broken, you are still as far as ever from equality. Political power has changed its shape, but not its nature."

"Social equality", says Bryce, "denotes the kind of mutual courtesy and respect which men show one another when each feels the other to be 'as good

1. Willoughby: *Social Justice* p. 51-52.

2. *Ibid.*, p. 53 and p. 54.

3. *Ibid.*, p. 54-55.

4. *Ibid.*

5. *Ibid.*, p. 57.

as himself, a respect which stands between condescension, on the one hand, and submissiveness, on the other.”<sup>1</sup>

By economic equality is of course meant equality in the possession of articles of material value, in other words, of wealth.

#### 4-27. Fraternity

The principle of Fraternity is a more difficult matter than the principles of liberty and equality. We may seek to formulate it said Barker by saying that the legal association, besides treating each individual member as a free agent in its scheme of law and an equal factor in the operation of that scheme, will also follow a third principle in distributing among its members the various rights which are the conditions of their personal development. This is the principle of providing for all and distributing among all the common equipment, material and mental which is needed by all as the common background and common basis of their individual lives. All of us individually need liberty and equality for ourselves all of us need collectively a common equipment for our common benefit. The usage of revolutionary France has given the name of Fraternity to the principle which leads to the distribution of this common equipment for common enjoyment. Fraternity in its strict sense is an emotion rather than a principle, and in that sense it cannot be said to be in *pari materia* with the principles of liberty and equality. But it is a term which has been traditionally used in a broader sense, and it may perhaps be used provisionally to designate a principle, governing the distribution of rights, which might also be called by the name of ‘co-operation’ or ‘solidarity’. The liberty of each individual as a free legal agent ; the equality of each as a legal factor in the legal association ; and the fraternity of all in the common enjoyment of a common equipment provided by common and co-operative effort—these, in summary, are the three principles, long associated by an ancient tradition which goes back ultimately to a Greek origin, on which the State and its law proceed in determining the distribution of rights.<sup>2</sup>

Rawls also believes that “in comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory. It is thought to be less specifically a political concept not in itself defining any other democratic rights but conveying instead certain attitudes of mind and forms of conduct without which we would lose sight of the values expressed by these rights. Or closely related to this, fraternity is held to represent a certain equality of social esteem manifest in various public conventions and in the absence of manners of deference and servility.”<sup>3</sup>

Ambedkar defines fraternity as “a sense of common brotherhood of all Indians, if Indian being one people. It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve.....In India there are castes. The castes are antinational. In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation Without fraternity, equality and liberty will be no deeper than coats of paint.”<sup>4</sup>

1. Bryce : *Modern Constitutions*
2. Barker: *Principle of Social and Political Theory*, p. 142-43.
3. Rawls: *A theory of Justice*, p. 105.
4. *Constituent Assembly Debates*, Vol, XI, pp. 979-80.

## Constitution—Interpretation and Amendment

### S Y N O P S I S

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### 5.1. Constitutional law—Meaning of.

Public law comprises the rules which specially relate to the structure, powers, rights, and activities of the state. The two divisions of public law are constitutional and administrative law. It is impossible, however, to draw any rigid line between these two, for they differ merely in the degree of importance pertaining to their subject-matters. Constitutional law deals with the structure, powers, and functions of the supreme power in the state, together with those of all the more important of the subordinate departments of government. Administrative law, on the other hand, is concerned with the multitudinous forms and instruments in and through which the lower ranges of governmental activity manifest themselves.<sup>1</sup>

The organisation of a modern state is of extraordinary complexity, and it is usual to regard it as divisible into two distinct parts. The first consists of its fundamental or essential elements; the second consists of its secondary elements the details of state structure and state action. The first, essential, and basal portion is known as the constitution of the state. The second has no generic title.<sup>2</sup>

### 5.2. Constitution—Meaning of.

James Bryce defined a constitution as “a frame of political society, organised through and by law that is to say one in which law has established permanent institutions with recognised functions and definite rights”. Again a constitution may be said to be a collection of principles according to which the powers of the Government, the rights of the governed, and the relations between the two are adjusted.<sup>3</sup>

A constitution means the system or body of fundamental principles according to which the Nation, State and body politic is constituted and governed.

These are general definitions but what applies to the Indian Constitution is the one given by Justice Miller. “A constitution in the American sense of the word is a written instrument by which the fundamental powers of the government are established, limited and defined; and by which these powers are distributed among several departments for their more safe and useful exercise for the benefit of the body politic”. In this definition, a constitution is seen as an organic instrument, under which governmental powers are both conferred and circumscribed.<sup>4</sup> The office and purpose of the constitution is to shape and fix the limits of governmental activity. The Constitution is in other words the basic source from which the government must derive its

1. Salmond : *Jurisprudence*, 13th Ed. 533.

2. *Ibid.*, p. 99.

3. Strong: *Modern Political Constitutions*, p. 11.

4. Bernard Schwartz: *The Powers of Governments.*, Vol. 1., p. 1.

authority. It is to the departments of government, what a law is to individuals, nay, it is not only a rule of action to the branches of government, but it is that from which their existence flows, and by which the power (or portions of the right to govern,) which may have committed to them are prescribed—it is their commission—nay, it is their creator”<sup>1</sup>

In its wider sense the term “Constitution means the whole scheme whereby a country is governed. In its narrower sense “Constitution” means the rules usually collected into some document which comes to be almost venerated as “The Constitution”.<sup>2</sup>

### 5.3. *Conventions.*

No country's Constitution can ever be compressed within the compass of one document and even where the attempt has been made it is necessary to consider the extra legal rules customs and conventions that grow up around the formal document.

The Indian Constitution with 395 Articles and 8 Schedules is the wordiest of all national Constitutions. The powers, privileges of the Parliament and the State Legislature and of the members thereof, the Constitution says shall be such as may from time to time be defined by the Parliament or the State Legislation of law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members at the time of the commencement of the Constitution.<sup>3</sup>

It must be remembered as Lord Bryce once said, that the British constitution “works by a body of understandings which no writer can formulate”: whereas the Constitution of India is contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practice or doctrines in interpreting a doubtful phrase whose origin can be traced or to study decisions on the constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the constitutions itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this constitution.<sup>4</sup>

### 5.4. *Constitution derives authority from people.*

A Constitution derives its authority generally from the people acting in their sovereign capacity and speaking through their representatives in a Constituent Assembly or Convention. It relates to the structure of the Government, the extent and distribution of its powers and the modes and principles of its operation.

### 5.5. *Nature of our Constitution.*

The Constitution is a political document. The creation of a government is a political act. The Constitution specifies the structure, organization, and

1. B. Schwartz . *The Powers of Government*, Vol. I, p. 2.

2. *Encyclopedia Britannica*, Vol. 6, p. 396.

3. *Constitution*, Article 105 and Article 194 Prior to *Constitution (Forty-fourth Amendment) Act*, 1978.

4. *Adegbenro v. Akintola*, (1963) 3 All E R 544 (550-51).

many of the processes of the various branches of the Government and it sets forth the powers of both Central and State Governments.

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.<sup>1</sup>

#### 5.6. *Constitution and Statutes—Distinction.*

The Constitution is the basic law providing the frame-work of government and creating the organs for the making of the laws. The distinction between the Constitution and the law is so fundamental that the Constitution is not regarded as a law or a Legislative act. The Constitution means the Constitution as amended. An amendment made in conformity with Art. 368 of the Constitution is a part of the Constitution and is likewise not a law.<sup>2</sup>

There is an essential distinction between Constitution and statutes.<sup>3</sup> A Statute is law made by the representatives of the people acting in their legislative capacity, subject to the superior authority, which is the Constitution. Statutes are enactments or rules for the government of civil conduct or for the administration or for the defence of the government.<sup>4</sup>

#### 5.7. *Constitution—Supreme law.*

In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Art. 368 of the Constitution itself makes a provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.<sup>5</sup>

The validity of an ordinary law can be questioned. When it is questioned it must be justified by reference to a higher law. In the case of the Constitution the validity is inherent and lies within itself. The validity of constitutional law cannot be justified by reference to another higher law. Every legal rule or norm owes its validity to some higher legal rule or norm. The Constitution is the basic norm. The Constitution generates its own validity. It is valid because it exists. The Constitution is binding because it is the Constitution. Any other law is binding only if and insofar as it is in conformity with the Constitution.<sup>6</sup>

1. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (704).

2. *Golak Nath v. State of Punjab*, 1967 SC 1643 (1720) per Bachawat, J.

3. *Ibid.*, p. 1666 per Subba Rao, C. J.

4. *Constitutional Law and its Administration*, by S. P. Weaver, p. 3.

5. *In re under Article 143, Constitution of India*, 1965 SC 745.

6. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (518) per Ray, J.

### 5.8. Basic structure of the Constitution.

The majority decision in *Keshavanada Bharati's* case<sup>1</sup> no doubt evolved the doctrine of basic structure or frame work of the Constitution but it did not lay down that any particular named features of the Constitution formed part of its basic structure or framework.

Sikri, C. J., mentioned supremacy of the Constitution, Republican and Democratic form of Government, Secular character of the Constitution, separation of powers among the legislature, executive and judiciary, federalism and dignity and freedom of the individual as essential features of the Constitution.<sup>2</sup> Shelat and Grover, JJ., added to the list, two other features : the dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV and the unity and the integrity of the Nation.<sup>3</sup> Hegde and Mukherjea, JJ., said that the broad contours, the basic elements or fundamental features of our Constitution are clearly delineated in the preamble.<sup>4</sup>

Jaganmohan Reddy, J., thought that sovereign democratic republic, parliamentary democracy, and the three organs of the State constituted the basic structure of the Constitution.<sup>5</sup> Khanna, J., held that basic structure indicated the broad contours and outlines of the Constitution and since the right to property was a matter of detail, it was not a part of that structure. But he appeared to be of the view that the democratic form of government, the secular character of the State and judicial review formed part of the basic structure.<sup>6</sup> It is obvious that these were merely illustrations of what each of the six learned Judges led by Sikri, C. J., thought to be essential features of the Constitution and they were not intended to be exhaustive. Shelat and Grover JJ., Hegde and Mukherjea, JJ., and Jaganmohan Reddy, J., in fact said in their judgments that their list of essential features which formed the basic structure of the Constitution was illustrative or incomplete. This enumeration of the essential features by the six learned Judges had obviously no binding authority ; first because the Judges were not required to decide as to what features or elements constituted the basic structure or framework of the Constitution and what each of them said in this connection was in the nature of obiter and could have only persuasive value ; secondly, because the enumeration was merely by way of illustration ; and thirdly, because the opinion of six judges that certain specified features formed part of the basic structure of the Constitution did not represent the majority opinion and hence could not be regarded as law declared by the Supreme Court under Article 141.

To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the Constitution. What constitutes basic structure is not like "a twinkling star up above the Constitution." It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225.

2. *Ibid.*, p. 366.

3. *Ibid.*, p. 454.

4. *Ibid.*, p. 484.

5. *Ibid.*, p. 698.

6. *Ibid.*, p. 767.

the Constitution which determine the type of democracy which the founders of that instrument established ; the equality and nature of justice—political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven.<sup>1</sup>

The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.<sup>2</sup>

Any thing that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of the constitution.

Article 31-C protected all laws even if they were inconsistent with or took away or abridged any of the rights conferred by Articles 14, 19 and 31. The validity of Article 31-C was upheld in *Keshavanand Bharti's* case. By the Constitution (Forty second Amendment) Act the protection was extended to laws which gave effect to the policy of the state towards securing *all or any of the principles laid down in Part IV of the Constitution*. The Supreme Court struck down this amendment in *Minerva Mills Case*.<sup>3</sup>

Bhagwati, J. in his strong dissent held that the Amended Article 31-C did no more than codify the existing position under the constitutional scheme by providing immunity to a law enacted really and genuinely for giving effect to a directive principle, so that needlessly futile and time consuming controversy whether such law contravened Article 14 or Articles 19 was eliminated. He held that Art. 31-C could not be regarded as violative of the basic structure of the constitution.<sup>4</sup>

In *Indira Gandhi v. Rajnarain*<sup>5</sup> Chandrachud, J., after observing that the ratio in the majority in *Keshavanand Bharti's* case<sup>6</sup> were merely illustrative of what constitutes the basic structure and were not intended to be exhaustive observed : “I consider, it beyond the pale of reasonable controversy that if there be any unamendable features of the constitution on the score that they form a part of the basic structure of the constitution they are that (i) India is a Sovereign Democratic Republic ; (ii) Equality of status and opportunity shall be secured to all its citizens ; (iii) the State shall have no religion of its own and all persons shall

1. *Indira Gandhi's Case*, (1976)2 SCR 526 per Mathews, J.,...accepted by Bhagwati, J. in *Minerva Mills Co.*, (1980) 3 SCC 673.

2. (1980) 3 SCC. 654.

3. 1980 SC 1789.

4. 1973 (4) SCC 225 (710).

5. 1976 (2) SCR 345: 1975 SC 2299 (2466).

6. (1973) 4 SCC 225.



be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and that, (iv) the Nation shall be governed by a Government of laws, not of men. These are, in my opinion, the pillars of our constitutional philosophy, the pillars therefore of the basic structure of the Constitution.” According to Sen, J. the concept of social and economic justice to build a welfare State is equally a part of basic structure or the foundation upon which the constitution rests.<sup>1</sup>

Most important of all is the Rule of law and its concomitant right of Judicial Review.

### 5.9. Interpretation by courts.

Whose responsibility is to interpret a written Constitution ? The important part of this function falls to the Executive branch which must inevitably and continually interpret the Constitution in making decision on the use of executive power. The Parliament and the Legislature of the States must continuously construe the constitution as guide to action.

Before and after the American Constitutional Convention of 1787 majority of the leading delegates favoured the subjection of legislation to judicial inquiry and possibly control, and they assumed that it was implicit in the institution they were proposing to adopt. The other view was a conception characteristic of the doctrine of separation of powers. This was that the courts in the judicial business in settling disputes between litigants must decide for themselves independently whether the constitution commands them or permits them or forbids them to disregard an Act of Congress that seemed to them to be in conflict with constitution.

Hamilton said that “there is no position which depends on clearer principles than, that every act of a delegated authority, contrary to the tenor of the Commission under which it is exercised, is void. No legislative Act, therefore, contrary to the Constitution, can be valid. If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the Legislature, in order among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the Judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning as well as the meaning of any particular Act proceeding from the Legislative body. If there should happen to be an irreconcilable variance between the two that which has the superior obligation and validity, of course, is to be preferred; in other words, the Constitution ought to be preferred to the statute. Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes stands in its opposition to that of the people declared in the Constitution, the Judges ought to be governed by the latter than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental”.<sup>2</sup>

1. *Bhim Singh v. Union of India*, (1981) 1 SCC 166 (20).

2. *Federalist*, 78.

### 5.10. Historical or contemporary Interpretation.

There are two cardinal problems in the realm of interpreting constitutional precepts. The first is the question of whether uncertainties regarding the meaning of a constitutional provision should be resolved by recourse to the understanding of the provision which was prevalent at the time of its adoption or whether a constitutional provision should be interpreted in the light of the knowledge, needs and experience existing at the time when the interpretative decision is rendered.<sup>1</sup>

In *Dred Scott v. Sanford*<sup>2</sup> the question was whether a negro could be considered a citizen and Taney, C. J. said : "No one, we presume, suppose that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favour than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

In *West Coast Hotel Co. v. Parrish*<sup>3</sup>, Scotherland, J. said that "the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written, that is, that they do not apply to a situation now to which they would have applied then is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise."<sup>4</sup>

There has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly

1. Bodenheimer: *Jurisprudence*, p. 405.

2. 60 U. S. (19 How) 393 (426).

3. *West Coast Hotel Co. v. Parrish*, 300 US 379 (402-3) Scotherland, J.

4. *Ibid.*

affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning "We must never forget that it is a constitution we are expounding"<sup>1</sup>..... a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."<sup>2</sup> "When we are dealing with the words of the Constitution", said this Court in *Missouri v. Holland*,<sup>3</sup> "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters .....The case therefore must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Justice Frankfurter, while Professor at Harvard University, said: "Every legal system for a living society, even when embodied in a written Constitution, must itself be alive. It is not merely the imprisonment of the past; it is also the unfolding of the future. Of all the means for ordering the political life of a nation, a federal system is the most complicated and subtle; it demands the most flexible and imaginative adjustments for harmonizing national and local interests. The Constitution of the United States is not a printed finality but a dynamic process; its application to the actualities of Government is not a mechanical exercise but a function of statecraft."

Later Justice Frankfurter added to this statement. "From generation to generation," he declared, "fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them.....Law whether derived from acts of Congress or the Constitution, is not an abstraction. The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being "

Mr. Justice Cardozo declared that a constitution states or ought to state not rules for the passing hour, but principles for an expanding future.<sup>4</sup> It must therefore be concluded that the situations where a material and substantial change of conditions has occurred, no injustice is done to the founding fathers of a constitution, if the courts of a later day, instead of ascertaining the intent which these men voiced with respect to the meaning of a constitutional clause in their own day, attempt to determine the intent which these men would presumably have held had they foreseen what our present conditions would be.<sup>5</sup>

1. *M'culloch v. Maryland*, 4 Wheat, 316 (407) : 4 L. ed. 579, 601.

2. *Ibid.*, p. 415.

3. 452 US 416 (433) : 64 L. ed. 641 (647).

4. Cardozo : *The Nature of Judicial Process*, p. 85.

5. Bodenhimer: *Jurisprudence*, p. 409.

Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issue facing the people which the legislature in its wisdom, through beneficial legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This court while acting as a sentinel on the *qui vive* to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such a right clashes with the larger interest of the country, it must yield to the latter.<sup>1</sup>

### 5.11. Principles of interpreting Constitution.

(a) *broad and liberal manner—Not in a pedantic sense.*

It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting the words of a Constitution, the same principles undoubtedly apply which are applicable in construing a statute, but as was observed by Lord Wright in *James v. Commonwealth of Australia*<sup>2</sup> :

“The ultimate resort must be determined upon the actual words used read not *in vacuo* but as occurring in a single complex instrument in which one part may throw light on the others.”

This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution.

It was observed in *Dwarkanadas Shrinivas v. Skolapur Spinning Weaving Co. Ltd.*<sup>3</sup> that the provisions of the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred. “The form is un-essential. It is the substance that we must seek.”<sup>4</sup> The attempt should always be to expand the reach and ambit of the fundamental rights rather than to attenuate its meaning and content.

Holmes, J. said :

“The provisions of the Constitution are not mathematical formulas having their essence in their form ; they are organic living institutions transplanted from English soil. The significance is vital, not formal ; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth.”<sup>5</sup>

1. *Pathumma v. State of Kerala*, (1978) 2 SCR 537 : 1978 SC 771 (774).

2. 55 CLR 1 (43).

3. (1954) SCR 674: AIR 1954 SC 119.

4. *Tara Prasad Singh v. Union of India*, (1980) 4 SCC 209.

5. *Gompers v. United States*, 58 L. ed. 1115 (1120).

A broad and liberal spirit should inspire those on whom the duty to interpret falls. Where the language is explicit, it had to be given effect to it cannot be unduly stretched so that it is distorted to supply any supposed error or omission. The other is, to quote the language of 1912 AC 571 cited with approval in 1939 FCR 18-(AIR 1939 FC 1): "If the text is explicit, the text is conclusive alike in what it directs and what it forbids." If the text is ambiguous, *i.e.* where the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and the scheme of the Act. The presumption unless there is anything to the contrary, is that the power is not withheld or that it does not exist at all; it is there in some quarter.

The courts are bound to give to the Constitution, such meaning as will make them harmonious unless there is apparent or, fairly to the implied conflict between, their respective provision.<sup>1</sup>

It is a rule of construction that no provision of the Constitution is to be segregated from all others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and so interpreted as to effect great purposes of the instrument.

A constitution is not to be construed in any narrow and pedantic sense. Gwyer, C. J., adopted the words of Higgins, J., of the High Court of Australia from the decision in *Attorney-General for New South Wales v. The Brewer Employees Union of New South Wales*<sup>2</sup> according to which even though the words of a constitution are to be interpreted on the same principles of interpretation as are applied to any ordinary law, these very principles of interpretation require taking into account the nature and scope of the Act remembering that "it is a constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be".<sup>3</sup>

In one of the very earliest references made to the Federal Court<sup>4</sup> under Section 213 of the Government of India Act, 1935 (which corresponded to Article 143 of the Constitution), Gwyer, C. J. observed that the rules which would apply to the interpretation of other statutes would apply equally to the interpretation of a constitutional enactment, but their application must be conditioned of necessity by the subject matter of the enactment itself, namely, the nature and scope of the Act itself which is a Constitution, "a mechanism under which laws are to be made and not a mere Act which declares what the law ought to be" He said that this was especially true of a Federal Constitution, with its nice balance of jurisdictions. A broad and liberal spirit must inspire those whose duty it is to interpret an organic instrument which sets up a constitutional machinery, a machinery meant to control the life of a nation, to embody its ideals for the present and the future; this does not however imply that those whose duty it is to interpret the Constitution are free to stretch or pervert the language of the enactment in the interests of the any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors.<sup>5</sup>

1. *The State of Rhode Island v. State of Massachusetts*, 9 L. ed. 1233.

2. (1908) 6 CLR 469 (611-12).

3. In *re C. P. and Berar Sales of Motor Spirit etc.*, *Taxation Act*, 1938, 1939 FCR 18 : 1939 FC 1.

4. 1939 FCR 18: 1939 FC 1.

5. In *re Sea Customs Act*, 1963 SC 1760 (1780); *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225.

**(b) Spirit of the Constitution.**

In *Keshavan v. State of Bombay*<sup>1</sup> the Supreme Court rejected the contention that the spirit of the constitution should be invoked in interpreting the constitution.

In *A. K. Gopalan's*<sup>2</sup> case the Supreme Court was invited to read into the Constitution implications derived from the "spirit of the Constitutions." Kania, C. J., said that to strike down the law on an assumed principle of construction would be "to place in the hands of the judicial powers too great and too indefinite either for its own security or the protection of private rights."

The argument of 'spirit' is always attractive and quite some eloquence can be infused into it. But one should remember what S. R. Das J., said in *Keshav Madhav Menon's* case that one must gather the spirit from the words or the language used in the Constitution.

**(c) Prospective.**

Every statute is *prima facie* prospective unless it is expressed or by necessary implications made to have retrospective operation. The same rule of interpretation also applies for the purpose of interpreting the Constitution.<sup>3</sup>

In *Habeeb Mohamed v. State of Hyderabad*<sup>4</sup> the Supreme Court held that the Constitution has no retrospective effect. The Constituent power conferred by Article 368 of the Constitution on the Parliament could be exercised both prospectively and retrospectively.<sup>5</sup>

**(d) Two constructions.**

When two constructions are possible the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory (*See Keshavanand v. State of Kerala, State of Punjab v. Ajib Singh, Collector of Custom v. Digvijay Singh Jie v. Spinning & Weaving Mills.*)<sup>6</sup>

In *Don John Douglas Liyange v. The Queen*<sup>7</sup> Lord Pearson declined to read the words of Section 29 (1) of the Ceylon Constitution as entitling the Parliament to pass legislation which usurped the Judicial power of the Judicature by passing an Act of Attainder against some persons or instructing a Judge to bring a verdict of guilty against some one who was being tried—if in law such usurpation would otherwise be contrary to the Constitution.

1. 1951 SCR 228: 1951 SC 128 (129).

2. 1950 SC 27.

3. *Keshavan v. State of Bombay*, 1951 SC 128 (130).

4. 1953 SC 287 (289): 1959 SCR 661.

5. *Sajjan Singh v. State of Rajasthan*, 1965 SC 845.

6. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (426); *State of Punjab v. Ajaib Singh*, 1953 S C R 254 (264); 1953 S C 10; *Collector of Custom v. Digvijay Singh Ji Spinning & Weaving Mills*, (1962) 1 SCR 896: 1961 SC 1549.

7. (1967) 1 AC 259.

(e) *Ambiguity.*

When the text of a Constitutional provision is not ambiguous and is clear; there is no room for construction and no excuse for interpolation or addition.<sup>1</sup>

The Courts are not at liberty to search for its meaning beyond the instrument.

(f) *Speeches.*

It is a sound rule of construction that speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any provision of the statute. But the question whether speeches made in the Constituent Assembly were admissible to ascertain the purpose behind a provision of the Constitution is not free from doubt. In *A. K. Gopalan v. State of Madras*<sup>2</sup> the debates and report of the drafting committee of the Constituent Assembly were referred to show that expression 'due process of law' was known to exist in the American Constitution and after discussion was not adopted by the Constituent Assembly in Article 21 of the Constitution. According to Kania, C. J., while it was not proper to take into consideration the opinion of the individual members of the Assembly to construe the meaning of a particular clause, when a question was raised whether a particular phrase or expression was up for consideration at all or not, a reference to the debates may be permitted.<sup>3</sup> In the same case Patanjali Shastri, J. refused to attach any importance to the speeches made by some members of the Assembly in the course of debate on Article 15 (now Article 21). He said: "A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the bill. The Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles etc. Mukherjea, J. said that in construing a provision in the Constitution it was better to leave out of account the debates in the Constituent Assembly but a higher value may be placed on the report of drafting Committee.<sup>4</sup> In *State of Travancore Cochin v. Bombay Co. Ltd.*<sup>5</sup> the Supreme Court held that speeches made by the members of the Constituent Assembly could not be used as aids for interpreting the Constitution.

In three cases, namely, *Golaknath's case*,<sup>6</sup> *Privy Purse case*<sup>7</sup> and *Union of India v. Dhillon*<sup>8</sup> the Supreme Court took the view that, such speeches could be taken into account. In *Golaknath's case* Subba Rao, J., who spoke for the majority referred to the speeches of Jawahar Lal Nehru and Dr. Ambedkar. Reference was also made to the speech of Dr. Ambedkar by Bachawat, J. In *Privy Purse case* Shah, J., who gave the leading majority judgment relied upon the speech of Sardar Patel (who was Minister for Home Affairs) in the Constituent Assembly when he moved for the adoption of Article 291 for the purpose

1. 75 L. ed. 640.

2. 1950 SCR 88: 1950 SC 27.

3. *Ibid.*, p. 38.

4. *Ibid.*, p. 73.

5. 1952 SCR 1112: 1952 SC 366.

6. *Golaknath v. State of Punjab* (1967) 2 SCR 762: 1967 SC 1643.

7. *Madhav Rao Jivaji Rao Scindia v. Union of India*, (1971) 3 SCR 9 : 1971 C 530.

8. (1972) 2 SCR 33 : 1972 S. C. 1361.

of showing the historical background and the circumstances which necessitated giving certain guarantees to the former Rulers. Reference was also made to the speeches in the Constituent Assembly by Mitter, J., for the purpose of interpreting Article 363. In *Union of India v. Dhillon's case*<sup>1</sup> which relating to the validity of amendment in the Wealth Tax Act, both the majority judgments as well as the minority judgment referred to the speeches made in the Constituent Assembly. But Sikri, C. J. said that though there was no harm in finding confirmation of ones interpretation in debates, yet it was quite a different thing to interpret the provisions of the Constitution in the light of the debates.<sup>2</sup>

Since *Golaknath's case* the Supreme Court has accepted the view that the speeches made in the Constituent Assembly could be referred to while dealing with the provisions of the Constitution. In *Kesavanand Bharti v. State of Kerala*<sup>3</sup> the speeches of Pt. Jawahar Lal Nehru, Dr. Ambedkar, Sardar Patel and others were sparingly used. According to Sikri, C. J., the speeches could be relied on only in order to see if the course of the progress of a particular provision or provisions threw any light on the historical background or showed that a common understanding or agreement was arrived at between certain sections of the people. Khanna, J., said that the speeches would be referred to for finding the history of the constitutional provision and the background against which the said provision was drafted. The speeches could also shed light to show as to what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches could not however for the basis for construing the provisions of the Constitution. The task of interpreting the provision of the Constitution has to be done independently and the reference to the speeches did not absolve the court from performing that task.<sup>4</sup> But Mathew, J. said that 'if the debates in the Constituent Assembly could be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading upto and attending its enactment, to ascertain the intention of the makers of the Constitution, it was difficult to see why the debates were inadmissible to throw light of the provision. It would be drawing an envisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision.'<sup>5</sup> Chandrachud, J. struck an entirely different note and he said that the debates were not admissible as aids to construction of constitutional provisions.

While interpreting the expression socialist state and the Directive Principles there is hardly any case where the Supreme Court does not refer to the speeches of national leaders like Nehru and others.<sup>6</sup>

#### (g) Liberal Construction.

The problem of construing constitutional provisions cannot reasonable be solved merely by adopting a literal construction of the words used in the relevant provisions. The Constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time. Naturally in a progressive and dynamic society the shape and appearance of these problems are bound to

1. (1972) 2 SCR 33: 1972 SC 1361.

2. (1973) Suppl. SCR 1: 1973 SC 1461.

3. (1973) 4 SCC 225.

4. *Ibid.*, pp. 743, 744.

5. *Ibid.*, p. 841.

6. See Jagadish Swarup's *Legislation and Interpretation* for a fuller discussion.



change with the inevitable consequence that the relevant words used in the Constitution may also change their meaning and significance.<sup>1</sup>

While dealing with a constitution every word is to be expounded in its plain, obvious and common sense unless the context furnishes some ground to control, qualify or enlarge it and there cannot be imposed upon the words any recondite meaning or any extraordinary gloss.<sup>2</sup>

(h) *Every word to be considered.*

In expounding the Constitution, every word must have due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added<sup>3</sup> words employed in the Constitution cannot be employed as meaningless.<sup>4</sup>

(i) *Powers under the Constitution.*

The sound construction of the constitution must allow to the legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>5</sup>

Principles of interpreting constitutional provisions, when conflicts between legislative bodies with separate powers entrusted to them arise are well settled. In *Attorney General for the State of New South Wales v. Brewery Employees Union*,<sup>6</sup> it was laid down that although the words of a constitution were to be interpreted in the same way as Courts interpret other statutes, it has to be borne in mind, while doing so, that what is interpreted is constitution a mechanism under which laws are to be made and not a mere Act which declares what that law is to be. This is specially so in the case of a federal constitution, with its nicely drawn balance of jurisdictions. Thus a broad and liberal spirit should inspire those on whom the duty to interpret falls. Where the language is explicit, it has to be given effect to ; it cannot be unduly stretched so that it is distorted to supply any supposed error or omission. To quote the language of 1912 AC 571 cited with approval in 1939 FCR 18-(AIR 1939 FC 1). "If the text is explicit, the text is conclusive alike in what it directs and what it forbids". If the text is ambiguous i. e. where the words establishing two mutually exclusive jurisdictions are wide enough to 'bring a particular power within either, recourse must be had to the context and the scheme of the Act. The presumption, unless there is anything to the contrary, is that the power is not withheld or that it does not exist at all ; it is there in some quarter.<sup>7</sup>

1. *Sajan Singh v. State of Rajasthan*, 1965 SC 845 (855).

2. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (739) per Khanna, J. see Story : *Constitution of the United States*, Vol. I, para 451.

3. *Holmes v. Jennison*, 10 L. ed. 579.

4. *United States v. Butler*, 80 L. ed. 477( 490).

5. *M'culloch v. The State of Maryland*, 4 L. ed. p. 605.

6. (1908) 6 CLR 469 (611) (Aus.).

7. *Union of India v. H. S. Dhillon*, 1972 SC 1061 (1085).

Constitutions are not ephemeral enactments designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it". The future is their care, and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in the words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This principle of interpretation which requires that a Constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes.

Unless the context otherwise requires, the General Clauses Act, 1897, shall subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.<sup>1</sup>

Any reference in the Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor as the case may be.<sup>2</sup>

For the purposes of this Constitution "foreign State" means any State other than India.

Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order.<sup>3</sup>

"While we want the constitution" said Nehru "to be as solid and permanent as we can make it, there is no permanence in constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital organic people. The Constituent Assembly not only refrained from putting a seal of finality and infallibility upon the constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the constitution subject to the fulfilment of extra ordinary terms and conditions as in America or Australia, but has provided a most facile procedure for amending the constitution".

Part 20 of the Constitution deals with the amendment of the Constitution and Article 368 as originally enacted reads :

**"368. Procedure for amendment of the Constitution.**—An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting,

1. Constitution Art. 367 (1).
2. Constitution Art. 367 (2).
3. Constitution Art. 367 (3).

it shall be presented to the President for his assent and upon such assent being given to the Bill the Constitution shall stand amended in accordance with the terms of the Bill :

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article, .

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislature before the Bill making provision for such amendment is presented to the President for assent."

#### **5-12. *Machinery for Amendment of the Constitution.***

The Constitution provides machinery whereby any of its provisions, whether relating to fundamental rights or to the structure of Government and the allocations to its various organs of legislative, executive or judicial powers, may be altered by the people through their elected representatives in the Parliament acting by specified majorities, though as respects some provisions the alteration be subject also to ratification by the States. The purpose served by this machinery for "amendment" is to ensure that those provisions which were regarded as important safeguards by the political parties in the Constituent Assembly, minority and majority alike, who took part in the framing of the Constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws.

The Constitution provides for three classes of amendments of its provisions. First, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in Articles 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of Article 368. Secondly, those that can be effected by a special majority as laid down in Article 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House present and voting; and thirdly, those that require, in addition to the special majority above mentioned, ratification by resolution passed by not less than one-half of the States specified in the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to Article 368. It will be seen that the power of effecting the first class of amendments is explicitly conferred on "Parliament", that is to say, the two Houses of Parliament and the President (Article 79). This would lead one to suppose, in the absence of a clear indication to the contrary, that the power of effecting the other two classes of amendments has also been conferred on the same body, namely, Parliament, for, the requirement of a different majority, which is merely procedural, can by itself be no reason for entrusting

the power to a different body. An examination of the language used in Article 368 confirms that view.<sup>1</sup>

It may be noted that Article 368 has three components: firstly, it deals with the amendment of the Constitution, secondly, it designates the body or bodies which can amend the Constitution, and lastly, it prescribes the form and the manner in which the amendment of the Constitution can be effected. The Article does not expressly confer power to amend; the power is necessarily implied in the Article. The Article makes it clear that the amendment of the Constitution can only be made by Parliament but in cases falling under the proviso, ratification by Legislatures of not less than one-half of the States is also necessary. That Article stipulates various things. To start with, the amendment to the Constitution must be initiated only by the introduction of a Bill for that purpose in either House of Parliament. It must then be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, and if the amendment seeks to make any change in the provisions mentioned in the proviso, it must be ratified by not less than one-half of the State Legislatures. Thereafter, it should be presented to the President for his assent. It further says that upon such assent being given to the Bill "the Constitution shall stand amended in accordance with terms of the Bill". To restate the position, Article 368 deals with the amendment of the Constitution. The Article contains both the power and the procedure for amending the Constitution.<sup>2</sup>

The next question is whether the power conferred under Article 368 is available for amending each and every provision of the Constitution. The Article opens by saying "An amendment of this Constitution" which means an amendment of each and every provision and part of the Constitution. There is nothing in that Article to restrict its scope. If we read Article 368 by itself, there can be no doubt that the power of amendment implied in that Article can reach each and every Article as well as every part of the Constitution.<sup>3</sup>

### 5.13. *Parliament, power to amend fundamental rights examined.*

Parliament is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire constitution including its basic structure and even to put and end to it by totally changing its identity. The limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure for if the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks,

1. *Shankari Prasad v. Union of India*, 1951 SC 458.

2. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (468) para 620.

3. *Ibid.*, p. 469, para 621.

directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.<sup>1</sup>

The Supreme Court in *Sankari Prasad Singh v. Union of India and State of Bihar*,<sup>2</sup> and *Sajjan Singh v. State of Rajasthan*,<sup>3</sup> examined the power to amend the Constitution.<sup>4</sup>

In *Sankari Prasad's* case (supra) the Constitution First-Amendment Act was challenged. The principal contention was that the First-Amendment in so far as it purported to take away or abridge the rights conferred by Part III of the Constitution fell within the prohibition of Article 13 (2) of the Constitution. The unanimous view of the Supreme Court was that although "Law" must ordinarily include constitutional law there was a clear demarcation between ordinary law which was made in exercise of legislative power and constitutional law which was made in exercise of constituent power. In the absence of a clear indication to the contrary it was difficult to hold that the framers of the Constitution intended to make the fundamental rights immune of constitutional amendment. The terms of Article 368 were general to empower Parliament to amend the Constitution without any exception. Article 13 (2) construed in the context of Article 13 meant that law in Article 13 (2) would be relateable to exercise of ordinary legislative power and not amendment to the Constitution.<sup>5</sup>

The validity of the Seventeenth Amendment was challenged before the Supreme Court in *Sajjan Singh's* case (supra). The main contention was that power prescribed by Article 226 was likely to be affected by the Seventeenth Amendment, and, therefore it was necessary that the special procedure laid down in the proviso to Article 368 should have been followed.<sup>6</sup>

The majority view of this Court in *Sajjan Singh's* case (supra) was that Article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution. The word "Law" in Article 13 (2) was held not to take in the Constitution Amendment Acts passed under Article 368. It was also said that fundamental rights in Article 19 could be regulated as specified in clauses (2) to (6) and, therefore, it could not be said to have been assumed by the Constitution makers that fundamental rights were static and incapable of expansion. It was said that the concept of public interest and other important considerations which were the basis of clauses (2) to (6) in Article 19 "may change and may even expand". The majority view said that "The Constitution makers knew that Parliament could be competent to make amendments in those rights (meaning thereby fundamental rights) so as to meet the challenge of the problem which may arise in the course of socio-economic progress and the development of the country."<sup>7</sup>

The minority view of the Supreme Court in *Sajjan Singh's* case (supra) doubted the correctness of the unanimous view in *Sankari Prasad's* case

1. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 649 para 86.

2. (1952) SCR 89: AIR 1951 SC 458.

3. (1965) 1 SCR 983: AIR 1965 SC 845.

4. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (514).

5. *Ibid.*, p. 514-15

6. *Ibid.*, p. 515.

7. *Ibid.*

(supra). The doubt was on a question as to whether fundamental rights could be abridged by exercise of power under Article 368. Its view was that the rights of society were made paramount and were placed above those of the individual, and though fundamental rights could be restricted under clauses (2) to (6) of the Article 19 there could be no "removal or debilitation" of such rights.<sup>1</sup>

#### 5.14. *Golaknath's case—Amendment of Fundamental Rights.*

In *Golak Nath's case* (supra) the Punjab Security of Land Tenures Act, 1953 was challenged as violative of fundamental rights and as not being protected by the Constitution First-Amendment Act, 1951, the Constitution Fourth-Amendment Act, 1955 and the Constitution Seventeenth-Amendment Act, 1964. The validity of the Mysore Land Reforms Act, 1962 as amended by Act 14 of 1965 was also challenged on the same grounds. The Punjab Act and the Mysore Act were included in the Ninth Schedule. It was common case that if the Seventeenth Amendment Act adding the Punjab Act and the Mysore Act in the Ninth Schedule was valid the two Acts could not be impugned on any ground.<sup>2</sup>

The majority decision of the Supreme Court in *Golak Nath's case* (supra) was that an amendment of the Constitution was "law" within the meaning of Article 13 (2). There were two reasonings in the majority view arriving at the same conclusion. The majority view where Subba Rao, C. J. spoke was as follows: "The power to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368. Article 368 deals only with procedure. Amendment was a legislative process. Amendment was law within the meaning of Article 13. Therefore, if an amendment took away or abridged rights conferred by Part III of the Constitution it was void. The Constitution First-Amendment Act, the Constitution Fourth-Amendment Act, and the Constitution Seventeenth-Amendment Act had abridged the scope of fundamental rights. On the basis of earlier decisions of the Supreme Court the Constitution Amendment Acts were declared to be valid. On the application of the doctrine of prospective overruling the amendments would continue to be valid. Parliament would have no power from the date of that decision (meaning thereby the decision in *Golak Nath's case* (supra) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights."<sup>3</sup>

The view of Hidayatullah, J. was this : "The fundamental rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights. The First, the Fourth and the Seventh Amendment Acts being part of the Constitution by acquiescence for a long time cannot be challenged. These Constitution Amendment Acts contain authority for the Seventeenth Amendment Act. Any further inroad into fundamental rights as they existed on the date of the decision will be illegal and unconstitutional unless it complied with Part III in general and Article 13 (2) in particular. The constituent body will have to be converted for abridging or taking away fundamental rights. The Punjab Act and the Mysore Act were valid not because they were included in the Ninth Schedule of the Constitution

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (514.)

2. *Ibid.*, p. 516.

3. *Ibid.*

but because they were protected by Article 31-A and the assent of the President.<sup>1</sup>

The two views forming the majority arrived at the same conclusion that an amendment of the Constitution being law within the meaning of Article 13 (2) would be unconstitutional if such an amendment abridged any fundamental right. The leading majority view did not express any final opinion as to whether fundamental rights could be abridged by Parliament exercising its residuary power and calling a Constituent Assembly “for making a new Constitution or radically changing it.” The concurring majority view was that a Constituent Assembly could be called by passing a law under Entry 97 of List I and then that assembly would be able to abridge or take away fundamental rights.<sup>2</sup>

The minority view of the five learned Judges expressed in three judgments as against the majority view of the six learned Judges in *Golak Nath's* case (supra) was this.<sup>3</sup>

Wanchoo, J., spoke for himself and two concurring learned Judges as follows: “Article 368 contains both the power and the procedure for amendment of the Constitution. It is incomprehensible that the residuary power of Parliament will apply to amendment of the Constitution when the procedure for amendment speaks of Amendment by ratification by the States. When an entire part of the constitution is devoted to amendment it will be more appropriate to read Article 368 as containing the power to amend because there is no specific mention of amendment in Article 348 or in any Entry of List I. The Constitution is the fundamental law and without express power to effect change legislative power cannot effect any change in the Constitution. Legislative Acts are passed under the power conferred by the Constitution. Article 245 which gives power to make law for the whole or any part of India is subject to the provisions of the Constitution. If, however, power to amend is in Article 248, read with the residuary Entry in List I that power is to be exercised subject to the Constitution and it cannot change the Constitution which is the fundamental law. It is because of the difference between the fundamental law and the legislative power under the Constitution that the power to amend cannot be located in the Residuary Entry which is law making power under the Constitution.”<sup>4</sup>

Article 368 confers power on Parliament subject to the procedure provided therein for amendment of any provision of the Constitution. It is impossible to introduce in the concept of amendment, any idea of improvement. The word “amendment” must be given its full meaning. This means that by amendment an existing Constitution or law can be changed. This change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by other or deletion of certain provision altogether. An amendment of the Constitution is not an ordinary law made under the powers conferred under Chapter I of Part XI of the Constitution, and, therefore, it cannot be subject to Article 13 (2). It is strange that the power conferred by Article 368 will be limited by putting an interpretation on the word “law” in Article 13 (2) which will include constitutional law also. The possibility of the abuse of any power has no

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (516).

2. *Ibid.*, para 764.

3. *Ibid.*, p. 517. para 765.

4. *Ibid.*, p. 517.

relevance in considering the question about the existence of the power itself. The power of amendment is the safety valve which to a large extent provides for stable growth and makes violent revolution more or less unnecessary.<sup>1</sup>

The two other supporting minority views were these. Bechawat, J., arrived at these conclusions: "No limitation on the amending power can be gathered from the language of Article 368. Therefore, each and every part of the Constitution may be amended under Article 368. The distinction between the Constitution and the laws is so fundamental that the Constitution is not regarded as a law or a legislative act. It is because a Constitution Amendment Act can amend the Constitution that it is not a law and Article 368 avoids all reference to law-making by Parliament. As soon as a Bill is passed in conformity with Article 368 the Constitution stands amended in accordance with the terms of the Bill. Amendment or change in certain articles does not mean necessarily improvement".<sup>2</sup>

Ramaswami, J., expressed the view: "The definition of law in Article 13 (3) does not include in terms of constitutional amendment though it includes ordinance, order, byelaw, rule, regulation, notification, custom or usage. The language of Article 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatever. If it had been intended by the Constitution makers that the fundamental rights guaranteed under Part III should be completely outside the scope of Article 368 it is reasonable to assume that they would have made an express provision to that effect. The expression "fundamental" does not lift the fundamental rights above the Constitution itself. In a matter of constitutional amendment it is not permissible to assume that there will be abuse of power and then utilise it as a test for finding out the scope of amending power."<sup>3</sup>

It is thus clear that the majority of Judges in the *Golak Nath* case (supra) consisting of Justices Wanchoo, Hidayatullah, Bhargava, Mitter, Bachawat and Ramaswami rejected the argument that Article 368 merely prescribed the procedure to be followed in amending the Constitution. They held that Article 368 also conferred the power to amend the Constitution. They rejected the argument that the power to amend could be found in Entry 97 of List I. The majority of Judges consisting of Subba Rao, C. J., and his 4 colleagues as well as Hidayatullah, J. held that there was no distinction between constituent power and legislative power and that the word 'law' used in Article 13 (2) includes a law passed by Parliament to amend the Constitution. Subba Rao C. J., and his four colleagues suggested that if a Constitution had to be radically altered the residuary power could be relied upon to call for a Constituent Assembly. Hidayatullah, J., took a different view and held that for making radical alterations so as to abridge Fundamental Rights Article 368 should be suitably amended and the Constituent Assembly should be called after passing a law under Entry 97 in the light of the amended provisions of Article 368. It is important to mention that all the eleven Judges who constituted the Bench were agreed that even Fundamental Rights could be taken away but they suggested different methods for achieving that purpose. Subba Rao, C. J., and his four colleagues suggested calling of a Constituent Assembly; Hidayatullah, J. suggested an amendment of Article 368 for calling a Constituent Assembly after passing a law under Entry 97; the remaining five Judges held that the Parliament itself had the power to amend the Constitution so as to abridge or take away the Fundamental Rights.<sup>4</sup>

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225(514) para 667.

2. *Ibid.*, para 768.

3. *Ibid.*, para 769.

4. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (975), para 2037.



The leading majority judgment did not decide whether Article 368 itself could be amended so as to confer a power to amend every provision of the Constitution. The reason for this was that the *Golak Nath's* case (supra) decided on the basis of the unamended Article 368. The question whether Fundamental Rights could be taken away by amending Article 368 was not before the Court. The question also, whether in future Parliament could by amending Article 368 assume the power to amend every part and provision of the Constitution was not in issue before the Court. Such a question could arise directly, as it arose in *Keshavanand Bharti's* case after an amendment was in fact made in Article 368, and the terms of that amendment were known. The observation in the leading majority judgment putting restraints on the future power of the Parliament to take away Fundamental Right cannot, therefore, constitute the ratio of the majority judgment.<sup>1</sup>

5-15. *Constitution (24th Amendment) Act, 1971, Amendment of Art. 13 and 268.*

In 1971, Parliament amended Articles 13 and 368 of the Constitution by the Constitution (Twenty-fourth Amendment) Act, 1971.

In Article 13 of the Constitution, after clause (3), the following clause was inserted namely :—

“(4) Nothing in this article shall apply to any amendment of this Constitution under Article 368.”

Article 368 of the Constitution was re-numbered as clause (2) therefore, and—

(a) for the marginal heading to that article, the following marginal heading was substituted, namely :—

“Power of Parliament to amend the Constitution and procedure therefor.” :

(b) before clause (2) as so re-numbered, the following clause was inserted, namely :—

“(i) Notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.”

(c) in clause (2) as so re-numbered, for the words “it shall be presented to the President who shall give his assent to the Bill and thereupon” shall be substituted ;

(d) after clause (2) as so re-numbered, the following clause was inserted, namely :—

“(3) Nothing in Article 13 shall apply to any amendment made under this article.”

5-16. *Supreme Court held Amendment valid—Keshavanand Bharti's case.*

The Constitution (Twenty-fourth Amendment) Act, 1971 was challenged before the Supreme Court in *Keshavanand Bharti's* case.<sup>2</sup> This case was heard

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 514 p. 976, para 2038.

2. (1973) 4 SCC 225

by twelve judges *viz.* Sikri, C. J., Shelat, Hegde, Grover, Mukherji, Mathew, Khanna, Beg, Dwivedi, Chandrachud, JJ. and the Supreme Court by a unanimous decision overuled its previous decision in *Golak Nath's* case. The validity of the Twenty-fourth Amendment was also unanimously upheld.

#### 5-17. *Amendment by Parliament under its Constituent Power.*

The various grounds on which *Golaknath's* case rested were re-examined notwithstanding the Amendment. It was held that while the Parliament amended a provision of the Constitution it exercised "constituent power". It was also held that the word 'law' in Article 13 of the Constitution did not include a "Constitutional Amendment."

In a rigid or controlled constitution there is distinction between legislative power and constituent power, not only conceptual but material and vital in introducing legal consequences. In a rigid or controlled constitution like the Constitution of India it is not correct to say that legislative power is the genus of which the constituent power is the species. It would be correct to say that the law making power is the genus of which legislative power and constituent power are species.<sup>1</sup> The legislatures constituted under the constitution have the power to enact laws on the topics indicated in Lists I to III in the Seventh Schedule or embodied specifically in certain provisions of the Constitution. The power to enact laws carried with it the power to amend or repeal them. But these powers of legislatures did not include any power to amend the Constitution, because it was the Constituent Assembly which enacted the Constitution and the status given by Article 368 to Parliament was the status of a Constituent Assembly. The distinction between the power to amend the Constitution and the ordinary power to enact laws is fundamental to all federal Constitutions. When Parliament is engaged in the amending process it is not legislating. It is exercising a constituent power which is *sui generis* bestowed upon it by the amending Clause Art. 368 in the Constitution.<sup>2</sup>

#### 5-18. *Art. 13—Law did not exclude law under constituent power of Parliament.*

Another question that was considered in *Keshavanand Bharti's* case was whether the constitution makers by using the expression 'law' in Article 13 (2) intended that expression should also include the exercise of Parliament's amending power under Article 368 of the Constitution.

Article 13 (2) has reference to ordinary piece of legislation. It would also, in view of the definition given in clause (a) of Article 13 (3) include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The Constitution has thus made it clear in matters in which there could be some doubt as to what would constitute 'law'. If it had been the intention of the framers of the Constitution that the 'law' in Article 13 would also include constitutional law including laws relating to the amendment of Constitution, it is not explained as to why they did not expressly so state in clause (a) of Article 13 (3). The Constitution itself contains indications of the distinction between the Constitution and the laws framed under the Constitution. Article 60 provides for the oath or affirmation to be made and subscribed by the President before entering upon office. The language in which that oath and affirmation have been couched,

1. *Keshavauand Bharti v. State of Kerala*, (1973) 4 SCC 225 (522) para 782.

2. *Ibid.*, para 783.

though not crucial, has some bearing. The form of the oath or affirmation is as under :

“I, A. B. do swear in the name of God solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

The fact that both the words “the Constitution and the law” have been used in the above form tends to show that for the purpose of the Constitution the law and the Constitution are not the same.

It was held in *Keshavanand Bharti's* case that the word “law” in Art. 13 (2) did not include a constitutional amendment but must be construed at references to the exercise of ordinary legislative power.<sup>2</sup> The twenty fourth Amendment gave effect to these principles.

**5-19. Power to amend before Amendment located in Art. 368 and not in Art. 97 Union List Seventh Schedule.**

Discussing the question whether Article 368 contained the power of amendment Beg J., said that despite the marginal note to Article 368, which indicate that Article 368 was prescribing the procedure for amending power was located in article 368. Article 368 provides specifically for a procedure for amending the constitution. When the prescribed procedure is strictly followed, “the Constitution shall stand amended in accordance with the terms of the Bill.” Parliament can bring about this result by strictly following the prescribed procedure. One who can bring about a certain result may truly be said to have the power to produce that result. Power to amend the Constitution is accordingly necessarily implied in Article 368.<sup>3</sup>

Power to amend the Constitution cannot reasonably be located in Entry 97 of List I of Schedule VII read with Article 248 of the Constitution. The idea of a provision for amending the Constitution was indisputably present in the minds of the Constitution-makers. If they had considered that the power to amend the Constitution was in its nature legislative, they would have surely included in express words this power in a specific entry in List I. Article 248 and Entry 97 of List I confers residuary power on Parliament. Article 246 and List I confer certain specific powers on Parliament. Residuary power is intended to comprehend matters which could not be foreseen by the Constitution.-makers at the time of the framing of the Constitution. As the topic of amending the Constitution was foreseen by them, it could not have been put in the residuary power. Article 245 (1) confers power on Parliament “subject to the provisions of this Constitution”. Articles 246 and 248 are subject to Article 245. Accordingly, a law made under Article 248 and Entry 97 of List I cannot be inconsistent with any provision of the Constitution. But a law made under Entry 97 for amending any provision of the Constitution would be inconsistent with that provision. Accordingly it would be invalid. But on following the prescribed procedure in Article 368, there ensues a valid amendment of the Constitution. So Article 248 and Entry 97 cannot include the power to amend the Constitution. The history of residuary power in our

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 Per Khanna, J., p. 745.

2. *Hegde & Mukherjee JJ.*, p. 470, *Ray, J.*, 520, *Reddy, J.*, p. 600; *Palekar, J.*, 699; *Mathew, J.*, p. 836; *Beg, J.*, p. 910; *Chandrachud, J.*, p. 983.

3. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC p. 924, para 1871.

country also indicates that the power to amend the Constitution cannot be subsumed in the residuary power.<sup>1</sup>

**5-20. *Limitation to the power to Amend the Constitution—Basic structure cannot be amended.***

Although the Supreme Court held that Article 368 gave very wide powers of amendment and that fundamental rights even might be amended, yet there was some implied limitation on the constituent power of the Parliament and that limitation was that the basic structure of the constitution could not be amended. On this question there was a sharp difference of opinion.

Sikri C. J., held that the fundamental importance of the freedom of the individual had to be preserved for all times to come and that it could not be amended out of existence. Fundamental Rights conferred by Part III of the Constitution could not be abrogated, though a reasonable abridgement of those rights could be effected in public interest. There was a limitation on the power of amendment by necessary implication which was apparent from a reading of the preamble and therefore, the expression "amendment of this Constitution" in Article 368 meant any addition or change in any of the provisions of the Constitution" within the broad contours of the preamble, made in order to carry out the basic objectives of the constitution. Accordingly every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.<sup>2</sup>

Shelat and Grover, JJ. held that the preamble to the Constitution contained the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles had to be balanced and harmonised. This balance and harmony between two integral parts of the Constitution formed a basic element of the Constitution which could not be altered. The word 'amendment' occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on the amending power which precluded Parliament from abrogating or changing the identity of the Constitution or any of its basic features.<sup>3</sup>

Hegde and Mukerjea, JJ., held that the Constitution of India which was essentially a social rather than a political document, was founded on a social philosophy and as such had two main features : basic and circumstantial. The basic constituent remained constant, the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution were delineated in the preamble and the Parliament had no power to abrogate or emasculate those basic elements of fundamental features. The building of a welfare state, the learned Judges said was the ultimate goal of every Government but that did not mean that in order to build a welfare State, human freedoms had to suffer a total destruction.<sup>4</sup>

Jaganmohan Reddy, J., held that the word 'amendment' was used in the sense of permitting a change, in contradistinction to destruction which the

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (925), para 1873.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*

repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution were reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word 'amendment' could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. According to the learned Judge, the provisions of Article 31-C, as they stood then, conferring power on Parliament and the State Legislature to enact laws for giving effect to the principles specified in clauses (b) and (c) of Article 39, altogether abrogated the right given by Article 14 and were for that reason unconstitutional. In conclusion, the learned Judge held that though the power of amendment was wide, it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.<sup>1</sup>

Khanna, J., broadly agreed with the aforesaid views of the six learned Judges and held that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution", in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.<sup>2</sup>

A contrary view was expressed by Ray, Mathew, Palekar, Beg, Dwivedi, and Chandrachud, JJ. Ray, J. said: "A constitution is essentially a frame of government laying down governmental powers exercisable by the legislature, executive and the judiciary. Even so other provisions are included in the Constitution of a country which provisions are considered by the framers of that Constitution to have such special importance that those should be included in the Constitution or organic law. Thus all provisions of the Constitution are essential and no distinction can be made between essential and non-essential features from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself. It is rightly said that if the positive power of "amendment of this Constitution" in Article 368 is restricted by raising the walls of essential features or core of essential feature, the clear intention of the Constituent Assembly will be nullified and that would make a mockery of the Constitution and that would lead to destruction of the Constitution by paying the way for extra constitutional or revolutionary changes in the Constitution. The theory of implied and inherent limitations cannot be allowed to act a *boa constrictor* to the clear and unambiguous power of amendment."<sup>3</sup>

To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction

1. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225.

2. *Ibid.*

3. *Ibid.*, para 901.

can be made. Again, the question arises as to who will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable. Who is to judge what the essential features are? On what touchstone are the essential features to be measured? Is there any yardstick by which it can be gauged? How much is essential and how much is not essential? How can the essential features or the core of the essential features be determined? If there are no indications in the Constitution as to what the essential features are the task of amendment of the Constitution becomes an unpredicable and indeterminate task. There must be an objective data and standard by which it can be predicated as to what is essential and what is not essential. If Parliament cannot judge these features Parliament cannot amend the Constitution. If, on the other hand, amendments are carried out by Parliament the petitioner contends that eventually court will find out as to whether the amendment violates or abridges essential features or the core of essential features. In the ultimate analysis it is the Court which will pronounce on the amendment as to whether it is permissible or not. This construction will have the effect of robbing Parliament of the power of amendment and reposing the final power of expressing validity of amendment in the courts.<sup>1</sup>

The theory of unamendability of so-called essential features is unmeritorious in the face of express provisions in Article 368 particularly in clauses (a) to (d) of the proviso. Clauses (a) to (d) relate to 66 Articles dealing with some of the most important features of the Constitution. Those articles relate to the judiciary, the legislature and the executive. The legislative relations between the Union and the States and the distributions of legislative power between them are all within the ambit of amendment.<sup>2</sup>

The summary of the various judgments was signed by nine out of the thirteen judges. Paragraph 2 of the summary reads to say that according to the majority Article 368 of the Constitution does not enable Parliament to alter the basic structure or framework of the Constitution. Whether or not the summary is a legitimate part of the judgment or is *per incuriam*, it is undeniable. It correctly reflects the majority view.<sup>3</sup>

In *Smt. Indira Gandhi v. Raj Narain*,<sup>4</sup> a bench of four Judges of the Supreme Court accepted the majority view in *Keshavanand Bharti's* case,<sup>5</sup> to be that the amendment power under Article 368, was though wide in its sweep and reading every provision of the Constitution it did not enable Parliament to alter the basic structure or frame work of the Constitution.<sup>6</sup>

This exercise of determining whether certain particular features formed part of the basic structure of the Constitution was to be undertaken by the Supreme Court in *Indira Gandhi's* case which came up for consideration within a short period of four years after the delivery of the judgments in *Kesavananda Bharti's* case. The Constitutional amendment which was challenged in that case was the Constitution (Thirty-ninth Amendment) Act, 1975, which introduced Article 329-A and the argument was that clause (4) of that newly

1. *Keshavanand Bharti v. State of Kerala* (1973) 4 SCC 225 (553) para 906.

2. *Ibid.*, p. 557, para 918.

3. *Minerva Mills Ltd. v. Union of India*, 1980 SC 1797, per Chandrachud, C. J.

4. (1976) 2 SCR 347: 1975 SC 2299.

5. 1973 SC 1461.

6. 1980 SC 1789 (1819).

added Article was constitutionally invalid on the ground that it violated the basic structure or framework of the Constitution. It may be pointed out that two of the learned Judges, namely, Khanna and Mathew, JJ., held that democracy was an essential feature forming part of the basic structure and struck down clause (4) of Article 329-A on the ground that it damaged the structure of the Constitution.

In *Smt. Indira Nehru Gandhi v. Raj Narain*,<sup>1</sup> Khanna, J. struck down clause 4 of Article 329A of the Constitution which abolished the forum for adjudicating upon a dispute relating to the validity of an election, on the ground that the particular Article which was introduced by a constitutional amendment violated the principle of free and fair elections which was an essential postulate of democracy and which, in its turn, was a part of the basic structure of the Constitution. Mathew, J., also struck down the Article on the ground that it damaged the essential feature of democracy. Chandrachud, J. also reached the same conclusion by holding that the provisions of the Article were an outright negation of the right of equality conferred by Article 14, a right which more than any other, is a basic postulate of the Constitution.<sup>2</sup>

The two clauses were interlinked. Clause (5) purported to remove all limitations on the amending power, while Clause 4 deprived the Court of their power to call in question any amendment of the Constitution. So long as Clause 4 stood an amendment though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in *Keshavanand Bharti's* case.

Article 368 of the Constitution was amended by Section 55 of the Constitution (Forty-second Amendment) Act, 1976. It embodied two new clauses in Article 368 viz clauses (4) and (5).

Clause 4 says : "No amendment of this Constitution (including the provisions of Part III) made or purported to have been made under this Article (Whether before or after the commencement of section 55 of the Constitution (42nd Amendment) Act shall be called in question in any court on any ground. This clause 4 was brought into force with effect from January, 3, 1977. Clause 5 : for the removal of doubts, it is hereby declared that there shall be no limitation whether on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution.

In *Minerva Mills Ltd. v. Union of India*,<sup>3</sup> the Supreme Court was called upon to determine on the basis of the majority view in *Keshavanand Bharti's* case whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 damaged the basic structure of the Constitution by destroying any of its basic features or essential elements.

Chandrachud, J. striking down the amendment said :

"Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the

1. (1976) 2 SCR 347: 1975 SC 2299.

2. *Minerva Mills Ltd. v. Union of India*, 1980 SC 1789 (1979), para 24.

3. 1980SC 1789.

Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one".<sup>1</sup>

Since, for the reasons above mentioned, Clause (5) of Article 368 transgresses the limitations on the amending power, it must be held to be unconstitutional.<sup>2</sup>

The newly introduced Clause (4) of Article 368 must suffer the same fate as Clause (5) because the two clauses are inter-linked. Clause (5) purports to remove all limitations on the amending power while Clause (4) deprives the courts of, their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature, and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Art. 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems a transparent case of transgression of the limitations on the amending power.<sup>3</sup>

If a constitutional amendment could not be pronounced to be invalid even if it destroyed the basic structure of the Constitution, a law passed in pursuance of such an amendment would be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge.<sup>4</sup>

Clause (4) of Art. 368 is in one sense an appendage of Cl. (5), though it should not be described as a logical consequence of Clause (5). If it be true that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as unconstitutional. Clause (4), must be equally beyond that power and must be struck down as such.<sup>5</sup>

In *Minerva Mills Ltd. v. Union of India*,<sup>6</sup> Bhagwati, J., said : "I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional machanisms or arrangements for judicial review cannot be made by Parliament.

1. *Minerva Mills Ltd. v. Union of India*, 1980 SC 1789, para 22.

2. *Ibid.*, para 25.

3. *Ibid.*, para 26.

4. *Ibid.*, para 27.

5. *Minerva Mills. Ltd. v. Union of India*, 1980 SC 1789 (1799) para 28.

6. 1980 SC 1789 (1826), para 93.



But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without effecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental right meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole Judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the constitution. The conclusion must therefore inevitably follow that clause (4) of Art. 368 is unconstitutional and void as damaging the basic structure of the Constitution”.

“That takes us to clause (5) of Article 368. This clause opens with the words “For the removal of doubts” and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368. It is difficult to appreciate the meaning of the opening words “For the removal of doubts” because the majority decision in *Kesavanand Bharati’s* case<sup>1</sup> clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament and in *Smt. Indira Gandhi’s* case,<sup>2</sup> all the Judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329-A (4) was to be judged. Therefore, after the decisions in *Keshavanand and Bharti’s* case and *Smt. Indira Gandhi’s* case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and Cl. (5) could not remove the doubt which did not exist. What Cl. (5), really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basis structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article

1. AIR 1973 SC 1461.

2. AIR 1975 SC 2299.

368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which the validity of this clause can be successfully assailed. This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold Cl. (5) of Art. 368. to be unconstitutional and void".<sup>1</sup>

Since the constitution is the basis of the national legal order, it sometimes, appears desirable to give it a more stable character than ordinary laws. Hence a change in the constitution is made more difficult than the enactment or amendment of ordinary laws. Such a constitution is called a rigid, stationary, or inelastic constitution, in contradistinction to a flexible, movable, or elastic one, which may be altered in the same way as ordinary laws. The original constitution of a State is the work of the founders of the State. If the State is created in a democratic way, the first constitution originates in a constituent assembly, what the French call *constituite*. Sometimes any change in the constitution is outside the competence of the regular legislative organ instituted by the constitution, and reserved for such a *constituite*, a special organ competent only for constitutional amendments. In this case it is customary to distinguish between a constituent power and a legislative power, each being exercised according to different procedures. The device most frequently resorted to in order to render constitutional amendments more difficult is to require a qualified majority (two-thirds or three-fourths) and a higher quorum (the number of the members of the legislative body competent to transact business) than usual. Sometimes, the change has to be decided upon several times before it acquires the force of law. In a federal State, any change of the federal constitution may have to be approved by the legislatures of a certain number of member States. And still other methods exist, too. It is even possible that any amendment of the constitution may be prohibited: and as a matter of fact some historical constitutions declare certain of their provisions, or the entire constitution within a certain space of time, as unamendable.

Every provision, however, whose purpose it is to render more difficult or even impossible an amendment of the constitution, is efficacious only against amendments carried out by an act of the legislative organ.

The distinction made by traditional theory between "written" and "unwritten" constitutions is, from a juristic point of view, the difference between constitutions, the norms of which are created by legislative acts and constitutions whose norms are created by custom.

If there exists a specific procedure for constitutional amendment different from the procedure of ordinary legislation, then general norms whose contents have nothing in common with the constitution (in a material sense) can be created through this special procedure. Such laws can be altered or abolished only in this way. They enjoy the same stability as the rigid constitution. If these laws are considered to be part of the "constitution", this concept of constitution is understood in a purely formal sense. "Constitution" in this sense does not mean norms regulating certain subject matters; it means nothing but a specific procedure of legislation; a certain legal form which may be filled with any legal content.

1. *Minerva Mills Ltd. v. Union of India*, 1980 SC 1789 (1826), para 94.

The Constitution which can be altered or amended without any special machinery is a flexible Constitution, that which requires special procedure for its alteration or a amendment is a rigid Constitution. Lord Birkenhead, L. C. adopted similar test in *McCawley v. The King*<sup>1</sup> though he used the nomenclature controlled and uncontrolled constitutions in respect of rigid and flexible constitutions. He observed : "The difference of view, may be traced mainly to the spirit and genius of the nation in which a particular Constitution has its birth. Some communities, and notably, Great Britain, have not in the framing of Constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, inspite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those Constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were, in such a matter, the Supreme *desiderata*. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the Constitution."

It is important to realise with clearness the nature of the distinction. It is not a distinction which depends in the least upon the difference between a unitary and a federal form of Government. Unitary forms of Government have also some times exhibited both ingenuity and resource in providing complicated machinery which required adjustment before the nature of the Constitution could be effectively modified.<sup>2</sup>

The Constitution is the Supreme Law. No law made by the Parliament or of the State legislature is above it.

Ratification by a State of Constitutional amendment is not an act of legislation within the proper sense of the word; it is but the expression of the assent of the State to a proposed amendment.<sup>3</sup>

The power to legislate in the enactment of Law's is derived from the people of the State. But to ratify a proposed amendment to the Constitution has its source in Art. 368 (2) of the Constitution.<sup>4</sup>

1. 89 LJPC 130 (135) : 1920 AC 760.

2. *Ibid.*, 135.

3. *Hawke v. Smith*, 64 L. Ed. 877.

4. *Ibid.*

# 6

## Territory

### SYNOPSIS

- 6.1. Territory...Necessity for a State.
- 6.2. India...Union of States.
- 6.3. Changes in the State after the Constitution.
- 6.4. Article 3.
- 6.5. Cession of Territory.
- 6.6. Acquisition of foreign territory.
- 6.7. Territory of State.
- 6.8. National and Territorial Waters.
- 6.9. Sub-Soil beneath Territorial land.
- 6.10. Territorial atmosphere.
- 6.11. Land, Mineral underlying ocean within the territorial waters.
- 6.12. Jurisdiction over Territorial Sea.
- 6.13. Continental Shelf.
- 6.14. Treaties about Air Space.
- 6.15. Act of State...Acquisition of territory...Effect of on rights of persons.
- 6.16. Escheat.
- 6.17. Property of State.

#### **6.1. Territory—Necessity for a State.**

The territory of a State is the foundation of its factual existence and the basis for the exercise of its legal powers. There is a distinction in the theory at any rate between the original *corpus* upon which the States' claim to Statehood depended and its title to territory which it might subsequently acquire.

The State territory is the defined portion of the surface of the globe, which is subjected to the sovereignty of the State. A State without a territory

is not possible. The importance of the State territory lies in the fact that it is the space within which the State exercises its supreme authority. The territory of a State is not the property of the Government or even of the people of a State. It is the country which is subjected to the territorial supremacy of the State.<sup>4</sup>

### 6.2. India—Union of States.

India is a Union of States; and the territory of India comprises (a) the territories of the States; (b) the territories of the Union territories specified in the First Schedule of the Constitution and (c) such other territories as may be acquired.<sup>2</sup>

A State means a state specified in the First Schedule to the Constitution and includes a Union territory.

First Schedule gives the names of the States the Union territories. Against each state and the Union territories are specified the territories area, in respect of which the State exercise its power.

### 6.3. Changes in the State after the Constitution.

It is necessary to bear in mind that the various administrative units which existed in British India were the result of acquisition of territory by the East India Company from time to time. The merger of Indian States since 1947 brought into the Dominion of India numerous Unions or States, based upon arrangements *ad hoc* and the constitutional set up in 1950 did not attempt, on account of diverse reasons, mainly political, to make any rational rearrangement of administrative units. Under the Constitution as originally promulgated there existed three categories of States, besides the centrally administered units of the Andamans Nicobar islands. Part 'A' States were the former Governors' provinces, with which were merged certain territories of the former Indian States to make geographically homogeneous units: There were the States of Assam, Bihar, Bombay, Madhya Pradesh (Central Provinces and Berar), Madras, Orissa, Punjab (East Punjab), Uttar Pradesh (United Provinces) and West Bengal. Part 'B' states represented groups formed out of 275 Bigger Indian States by mutual arrangement into Unions: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab, States Union, Rajasthan Saurashtra and Travancore, Cochin. Part 'C' States were the former Chief Commissioners' Provinces. Ajmer, Bhopal, Bilashpur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. Part 'D' States were the Andaman and Nicobar Islands. These units were continued under the Constitution merely because they formerly existed. The Assam (Alteration of Boundaries) Act, 1951 altered the boundaries of Assam consequent on the cession of strip of territory of Bhutan.

In 1953 the Parliament passed an Act 30 of 1953 for the formation of the State of Andhra and for transfer of territory from Madras to Mysore. With effect from 1st October, 1953 the new State of Andhra was formed. Consequential amendments were made in the 1st Schedule of the Constitution. The Himachal Pradesh and Bilaspur, New State Act, 1954, merged the two Part C States of Himachal Pradesh and Bilaspur to form one State namely, Himachal Pradesh.

1. Oppenheim International Law, Vol. 1, p. 451, 452.

2. Constitution, Art. 1 (1) and (3).

7.14) The States of India as they existed prior to the Constitutional had been formed largely as a result of historical accidents and circumstances and there had, therefore, been a demand for the reorganization of the component units of the Indian Union on a more rational basis, after taking into account not only the growing importance of the regional languages, but also financial, economic and administrative considerations. The State Reorganisation Commission was constituted in December 1953, and it submitted its report on 30th September, 1955.

The main feature of the reorganisation proposed were the abolition of the existing constitutional distinction between Part A, Part B and Part C States, and for the establishment of two categories of the component units of the Union, to be called States and Union territories, and the abolition of the institution of the Rajpramukh consequent on the disappearance of the Part B States.

In order to provide for the reorganisation of the States of India the Parliament passed the State Reorganisation Act 37 of 1956, which came into effect on 1st of November, 1956. The Act provided for the transfer of certain areas of Hyderabad to the State of Andhra and the name of State of Andhra was changed to State of Andhra Pradesh for the transfer of certain areas from Travancore-Cochin to Madras, and the forming of the new States of Kerala, Mysore, Bombay, Madhya Pradesh, (merger of Madhya Bharat, Vindhya Pradesh and Bhopal with the Mahakosal area of Madhya Pradesh), Rajasthan, and Punjab State, (the merger of Ajmer with Rajasthan) and Punjab State, (the merger of the Patiala and East Punjab States Union with Punjab.)

Kerala State was formed comprising the territories of the existing State of Travancore-Cochin. Another State was formed which was known as State of Mysore. A new Bombay State, a New Madhya Pradesh State and a New Rajasthan State and a new Punjab State came into existence as a result of the States Reorganisation Act.

In 1959 Rajasthan and Madhya Pradesh (transfer of territories) Act was passed to provide for the transfer of certain territories from the State of Rajasthan to the State of Madhya Pradesh.

The Bombay State was reorganised by the Bombay Reorganisation Act XI of 1960. This Act created two States—The State of Gujarat and the State of Maharashtra with effect from 1-5-1960.

The State of Nagaland Act 27 of 1962 provided for the abolition of the Naga Hills area and creation of a separate State and amended the Sixth Schedule to the Constitution. As from 1-12-1963 the State of Nagaland was formed.

In 1966 the Parliament passed the Punjab Reorganisation Act 31 of 1966 to provide for the reorganisation of the existing State of Punjab with effect from 1-11-1966. A new State to be known as State of Haryana comprising certain territories of the existing State of Punjab were transferred to the new State. Some territories were transferred from Punjab to Himanchal Pradesh, Chandigarh became a Union territory.

In 1969 the Assam Reorganisation (Meghalaya) Act was passed to provide for the formation within the State of Assam of an autonomous State to be known as Meghalaya.

By virtue of the State of Himanchal Pradesh Act 53 of 1970 a new State to be known as the State of Himanchal Pradesh comprising the territory which

immediately before that day were comprising the state Union territory of Himanchal Pradesh was established.

In 1971 another change was brought about by the Act North-Eastern Areas (Reorganisation) Act 81 of 1971. On and from the appointed day five new States were established viz. (1) the State of Manipur, (2) the State of Tripura; (3) the State of Meghalay. By the same Act two new union territories were formed viz. the Union territory of Mizoram and the Union territory of Arunachal Pradesh. The names of Mysore was changed to Karnataka by the Karnataka Act, 1973 and the name of Madras was changed to Tamil Nadu.

India that is Bharat is the sovereign state and is a Union of States. The territory of India comprise: (a) the territories of the States, (b) Union territories specified in the First Schedule and (c) such other territories as may be acquired.<sup>2</sup>

Parliament may by law admit into the Union or establish new States on such terms and conditions as it thinks fit.<sup>2</sup>

Before its amendment by the Constitution (Seventh-Amendment) Act, 1956, Article 1 referred to the territory of India as comprising the territories, of the States specified in Parts A, B, and C as well as the territories specified in Part D of the Schedule and such of the territories as might be acquired. The distinction between Parts A, B and C and territories specified in Part D was abolished.

#### 6.4. Article 3.

The States and the territories thereof after the amendment of Article 1 (2) reads: State and the territories thereof shall be as specified in the First Schedule.

The Constitution contemplates changes of the territorial limits of the constituent States and there is no guarantee about their territorial integrity.<sup>3</sup>

Parliament may by law (a) form a new State by separation of territory from any State or by uniting two or more states or parts of States or by uniting any territory to a part of any State (b) increase the area of any State (c) diminish the area of any State (d) alter the boundaries of any State (e) alter the name of any State.<sup>4</sup> The word State includes a Union territory.<sup>5</sup>

No Bill for this purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or names of any of the States not including a Union territory the Bill has been referred by the President to the Legislature of that State not the Legislature of a Union territory for expressing its views thereon within such period as may be specified in

1. *Constitution*, Art. 1 (3) (c).
2. *Constitution*, Art. (2).
3. *Constitution*, Art. 1 (2).
4. *Ref. by President of India under Art. 143 (1)*, 1960 SC 845 (857).
5. *Constitution*, Art. 3, Explanation I.
6. *Constitution*, Art. 3, Explanation 2.

the reference or within such period as the President may allow and the period so specific or allowed has expired.<sup>1</sup>

The intention seems to be to give an opportunity to the State Legislature to express its view within the time allowed. If the State legislature fails to avail itself of the opportunity such failure would not invalidate the introduction of the Bill. There is nothing in the proviso to indicate that Parliament must accept or act upon the view of the State Legislature. Indeed two State Legislatures may express totally divergent views. All that is contemplated is that Parliament should have before it the views of the State legislatures to the proposals contained in the Bill and then be free to deal with the Bill in any manner it thinks fit and following the usual practice and procedure prescribed by and under the rules of business.<sup>2</sup> What is to be referred to the State Legislature is the proposal contained in the Bill. It is not necessary that every time an amendment of the proposal contained in the bill is moved and accepted, a fresh reference should be made to the State Legislature.<sup>3</sup>

Parliament has been vested with the exclusive power of admitting or establishing new States, increasing or diminishing the area of an existing State or altering its boundaries, the legislature or legislatures of the States concerned having only the right to an expression of views on the proposals. For making such territorial adjustments it is not necessary even to invoke the provisions governing constitutional amendments.<sup>4</sup>

*Prima facie* Article 3 appears to deal with the problems which would arise on the reorganisation of the constituent States of India on linguistic or any other basis: but that is not the entire scope of Article 3. Broadly stated it deals with the internal adjustment *inter se* of the territories of the constituent States of India. Article 3 (a) enables Parliament to form a new State and this can be done either by the separation of the territory from any State or by uniting two or more States or parts of States, or by uniting any territory to a part of any State. There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under Article 1 (3) (c) is included in the last clause of Article 3 (a) and that such territory may, after its acquisition, be absorbed in the new State which may be formed under Article 3 (a). Thus Article 3 (a) deals with the problem of the formation of a new State and indicates the modes by which a new State can be formed.<sup>5</sup>

Article 3 (b) provides that a law may be passed to increase the area of any State. This increase may be incidental to the reorganisation of States under Article 3 (b) may have been taken out from the area of another State. The increase in the area of any State may also be the result of adding to any State any part of the territory specified in Article 1 (3) (c). Article 3 (d) refers to the alteration of the boundaries of any State and such alteration would be the consequence of any of the adjustments specified in Article 3 (a), (b) or (c). Article 3 (e) refers to the alteration of the name of any State.<sup>6</sup>

1. Constitution, Art. 3, Proviso.

2. *Babulal Parate v. State of Bombay*: 1960 SC 51 (53-4).

3. *Ibid.*, p. 54.

4. *Ibid.*, p. 55.

5. *Ref. by President of India under Art. 143 (1)*, 1960 SC 845 (859).

6. *Ibid.*



Part of the Hyderabad State was added to the Andhra State and renamed as Andhra Pradesh State, part of the Hyderabad State along with parts of Bombay State and other States was formed into a new part A Bombay State and part of Hyderabad State along with the State of Mysore and parts of other States was formed into a new Mysore State, exhausting, by the process, the entire area of the State of Hyderabad and by the amendment of the schedules the Hyderabad State, whose area was distributed among the different States, was excluded from the schedule. In *Shrikishan v. The State*<sup>1</sup> the question was whether the process adopted could be sustained under the Articles of the Constitution.

Subba Rao, C. J. said, there was nothing in Article 3 which precluded the Parliament from cutting away the entire area of a State to form a new State or to increase the area of another State. To State the problem concretely, Parliament by adding the Telengana area to the Andhra State and by renaming it Andhra Pradesh acted under Article 3 (b), (c) and (e). Article 3 (b) enabled to increase the area of the Andhra State, Article 3 (c) to diminish the area of the Hyderabad State and Article 3(e) to alter the name of the Andhra State.<sup>2</sup> So too, Article 3 (a) empowered it to unite parts of the Hyderabad State with parts of other States. The same Act deleted the Hyderabad State from the Schedule as no part of it existed after the aforesaid process was completed. The argument in the above case that the Hyderabad State was omitted in the First Schedule of the Constitution without following the prescribed procedure laid down in Article 368 was also not sustained in view of Article 4 of the Constitution. Article 4 is as much a part of the Constitution as Article 368. Both of them, therefore should be read together.<sup>3</sup>

If so read, the amendment authorised to be made under Article 4 shall be deemed to be taken away from the category of amendments provided by Article 368 and, therefore the procedure prescribed under the latter Article need not be followed.

Section 290, Government of India Act, 1935, provided that.....

“Subject to the provisions of this section His Majesty may by order in Council—

- (a) create a new province;
- (b) increase the area of any province;
- (c) diminish the area of any province;
- (d) alter the boundaries of any province.

Before the draft of any such order was laid before Parliament, the Secretary of State shall take such steps as His Majesty may direct for ascertaining the views of the federal Government and the Chambers of the Federal Legislature and the views of the Government and the Chamber or Chambers of the Legislature of any province which will be affected by the Order, both with respect to the proposal to make the order and with respect to the provisions to be inserted therein.”

After the Independence Act of 1947, and, under the Section as adapted by the India Provisional Constitution Order, 1947, the above power was

1. 1957 AP 734.

2. *Ibid.*, p. 737.

3. *Ibid.*, p. 738.

vested in the Governor-General, and now under the Constitution it is vested in Parliament.

Article IV, Section 3 of the American Constitution lays down: "But no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. Sections 123 and 124 of the Australian Constitution state as follows: "The Parliament of the Commonwealth may with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the Union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

It will thus be seen that the provisions in Article 3 of the Constitution, confer wider power upon Parliament than either under the American or the Australian Constitution. In the latter, the consent of the component States or a majority of its electors must be obtained. Thus there must be either consent or a referendum. In India it is sufficient if only the view of the State is ascertained.

In other words, the powers under Article 3 may be enforced upon an unwilling component State. It, therefore, approximates more to the Government of India Act, 1935 than its foreign counter-parts. Under Article 3, Parliament may by law form a new State by uniting two or more States, for this purpose a Bill must be introduced in Parliament.

Clause (c) of Article 3 is restricted to inter-State adjustments and does not apply to cession of territory in favour of a foreign State. Hence, an agreement which involves a cession of a part of the territory of India in favour of a foreign State cannot be implemented by passing a law under this Article. It can be effected only by an amendment of the Constitution. But a settlement of boundary dispute cannot be held to be a cession of territory.

The effect of Article 4 is that the laws relatable to Article 2 or Article 3 are not to be treated as constitutional amendments for the purpose of Article 368, which means that if legislation is competent under Article 3, it would be unnecessary to invoke Article 368. On the other hand, it is equally clear that if legislation in respect of the relevant topic is not competent under Article 3, Article 368 would inevitably apply.<sup>1</sup>

Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner-State in favour of another State. A sovereign State can exercise its right to cede a part of its territory to a foreign State. This power is of course subject to the limitation which the constitution of the State may require expressly or by necessary implication impose in that behalf.<sup>2</sup>

Parliament may by law diminish the area of any State. *Prima facie* it appears unreasonable to suggest that the makers of the Constitution wanted to

1. *Ref.* by President of India under Art. 143 (1), 1960 SC 845 (859).

2. *Ibid.*, p. 857.

provide for the cession of national territory under Article 3 (c). If the power to acquire foreign territory which is an essential attribute of sovereignty is now expressly conferred by the Constitution, there is no reason why the power to cede a part of the national territory which is also an essential attribute of sovereignty should have been provided for by the Constitution. Both of these essential attributes of sovereignty are outside the Constitution and can be exercised by India as a sovereign State.<sup>1</sup>

#### 6.5. *Cession of Territory.*

Both the essential attribute of sovereignty—power to acquire foreign territory and power to cede—is not expressly provided for by the constitution. Therefore, even if Article 3 (c) receives the widest interpretation it would not cover a case of cession of a part of national territory in favour of a foreign State. The diminution of the area of any State to which it refers postulates that the area diminished from the State in question should and must continue to be a part of the territory of India it may increase the area of any other State or may be dealt with in any other manner authorised either by Article 3 or other relevant provisions of the Constitution; but it would not cease to be a part of the territory of India. It would be unduly straining the language of Article 3 (c) to hold that by implication it provides for cases of cession of a part of national territory. The power to cede national territory cannot be read in Article 3 (c) by implication.<sup>2</sup>

An agreement which involves a cession of a part of the territory of India in favour of foreign State can be implemented by Parliament by passing a law under Article 3 of the Constitution.<sup>3</sup>

It would not be competent to Parliament to make a law relating to Article 3 of the Constitution for the purpose of implementing the Agreement. The law necessary to implement the Agreement has to be passed under Article 368.<sup>4</sup>

In the *Berubari's* case<sup>5</sup> the fact was that the Prime Ministers of India and Pakistan on 10th September, 1958, 23rd October, 59, and 11th January, 1960 entered into three agreements by which part of Berubari Union No. 12 as well as some of the Cooch Behar Enclaves were given to Pakistan.

The agreement amounted to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment could be made only under Article 368, and acting under Article 368 Parliament may make a law to give effect to, and implement, the Agreement in question. It was held by the Supreme Court that Parliament may, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the Agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the Agreement.<sup>6</sup>

1. *Ref. by President of India under Art. 143*, 1960 SC 845 (860).

2. *Ibid.*, p. 860.

3. *Ibid.*, p. 860.

4. *Ibid.*, p. 861.

5. 1960 SC 845.

6. *Ref. by President of India under Art. 143 (1)* : 1960 SC 845 (861).

Pursuant to this decision of the Supreme Court the Constitution (Ninth Amendment) Act, 1960 was passed to amend the Constitution of India to give effect to the transfer of certain territories to Pakistan in pursuance of the agreements entered into between the Government of India and Pakistan.

In *Ram Kishore Sen v. Union of India*<sup>1</sup> which is known as *Berubari II* case it was common ground that village Chilavati had been allotted to Pakistan but through inadvertence a part of it was not delivered to Pakistan on the occasion of the partition which followed the Redcliffe Award and continued to be administered as part of West Bengal under Entry 13 in the First Schedule. The Supreme Court held that this area had not constitutionally and validly become part of West Bengal and that being so there was no question about the constitutional validity of the proposed transfer of that area to Pakistan.

The first *Berubari* case dealt with transfer of territory which was *de facto* and *de jure* Indian territory and therefore as the extent of Indian territories as defined in Art. 1 read with First Schedule was reduced, a constitutional amendment was held necessary. The second case concerned territory which was *de facto* under the administration by India being *de jure* that of Pakistan, transfer of that territory which was not a part of Indian territory was held not to require a constitutional amendment. Neither case dealt with a boundary dispute and it was not said that for adjustment of boundaries a constitutional amendment was not required.

In 1965 the Government of India and the Government of Pakistan agreed to appoint a Tribunal for determination and demarcation of the border in the areas in the Rann of Kutch.

The disputed area was about 3500 sq. miles out of this about 350 sq. miles were by the Award included in Pakistan. In *Maganbhai v. Union of India*<sup>2</sup> it was urged that by the alignment of the boundary territory which was Indian was not declared foreign territory and that it could not be implemented without the authority of an amendment modifying the boundaries of the State of Gujarat in which was now included the Rann of Kutch. The Supreme Court rejected the claim and held that "a settlement of a boundary dispute can not be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. It only seeks to reproduce a line a statutable boundary and it is so fixed. The case is one in which each contending state *ex facie* is uncertain of its own rights and therefore, consents to the appointment of an arbitral machinery. Such a case is plainly distinguishable from a case of cession of territory known to be home territory.<sup>3</sup> The power of the executive can be exercised to correct boundaries after they had been settled. The decision to implement the Award was within the competence of the executive wing of the Government and no constitutional amendment was necessary."<sup>4</sup>

The acquisition of foreign territory by India in exercise of its inherent right as a sovereign state automatically makes the said territory a part of the territory of India. After such territory is thus acquired and factually made a

1. (1966) 1 SCR 430: 1966 SC 644.

2. 1969 SC 783.

3. *Ibid.*, p. 798.

4. *Ibid.*, p. 801.

part of the territory of India the process of law may assimilate it either under Article 2 or under Article 3 (a) of (b).<sup>1</sup>

This Article shows that Foreign territories which after acquisition would become part of the territory of India, under Article (1) (3) (c) can by law be admitted into the Union or may be constituted into new States on such terms and conditions as Parliament thinks fit.<sup>2</sup>

#### 6.6. Acquisition of foreign territory.

Article 1 (3) (c) does not confer power of authority on India to acquire foreign territories. Under International law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as power to cede national territory in favour of a foreign State. What Art. 1 (3) (c) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so. It refers broadly to all foreign territories which may be acquired by India and provides that as soon as they are acquired they would form part of the territory of India.<sup>3</sup>

#### 6.7. Territory of State.

The territory of a state consists in the first place of the land within its boundaries. To this must be added, in the case of a state with a sea coast, certain waters which are within or *adjacent* to its land boundaries.<sup>4</sup> These waters are of two kinds—national and territorial: *National* waters, consist of the waters in its lakes, in its canals, in its rivers together with their mouths, in its ports and harbours, and in some of its gulfs and bays. These different kinds of national, or as they are sometime called internal or inland, must be distinguished from territorial waters. National waters are, in fact, legally though not physically, equivalent to national land. Territorial waters consist of the waters contained in a certain zone or belt, called the maritime or marginal belt, which surrounds a State and thus includes a part of the waters in some of its bays, gulfs, and straits.<sup>5</sup>

#### 6.8. National and Territorial Waters.

The distinction between national and territorial waters is important from the point of view of International law (1) because in territorial waters foreign States can claim for their ships a certain right of passage, whereas in national waters no such right exists; (2) because in the case of gulfs and bays which are admitted to be national, the base line for the measurement of territorial waters is the line where the waters of the gulf or bay cease to be national; and (3) it is also possible that the Municipal Law of certain State draws a distinction in the matter of jurisdiction.<sup>6</sup>

In contradistinction to these real parts of State territory there are some things that are either in every respect or for some purposes treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high

1. *Ref. by President of India under Art. 143 (1): 1960 SC 845 (858).*

2. *Ibid.*

3. *Ibid.* (856).

4. *Greig: International Law*, p. 155.

5. *Oppenheim: International Law*, Vol. 1, 451-452.

6. *Ibid.*, p. 461.

seas as well as in foreign territorial waters are essentially in every point treated as though they were floating parts of their home State. The premises in which foreign diplomatic envoys have their official residence are in many respects treated as though they were parts of the home States of the envoys concerned. Again, merchantmen on the high seas are in certain respects treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.<sup>1</sup>

#### 6.9. *Sub Soil beneath Territorial land.*

The subsoil beneath the territorial land and water is of importance on account of telegraph and telephone wires and the like, and also on account of the working of mines and the building of tunnels. The territorial subsoil is not a special part of territory, although this is frequently asserted. But it is a universally recognised rule of the law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface and the territorial waters appurtenant to the territory of the State.<sup>2</sup>

#### 6.10. *Territorial atmosphere.*

The space of the territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of the greatest importance on account of wires, for telegraphs, telephones, electric traction, and the like, on account of wireless telegraphy, and, above all, on account of aerial navigation.<sup>3</sup>

#### 6.11. *Land, Mineral underlying ocean within the territorials water.*

All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.<sup>4</sup>

All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.<sup>5</sup>

The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

Whereas internal waters are subject to the absolute territorial sovereignty of a state, the position of territorial waters is less clearly defined. Article 1 of the Territorial Sea Convention provides that the "sovereignty of a state extends, beyond its land territory and its internal waters: to a belt of sea." Although a state has the right to prohibit the ships of other states from fishing, and to prevent the hostile operations of foreign vessels, within its territorial waters, the "sovereignty" is nevertheless subject to a number of exemptions in favour of the ships of foreign states, principally the right of innocent passage.<sup>6</sup>

1. Oppenheim: *International Law, A treatise*, p. 461.

2. *Ibid.*, p. 462.

3. *Ibid.*

4. *Constitution*, Art. 297 (1)

5. *Constitution*, Art. 297 (2).

6. Greig : *International Law*, p. 193-194.

6-12. *Jurisdiction over Territorial Sea.*

Although some doubts still exist as to the jurisdictional rights enjoyed by a state over its territorial sea, there has been no measure of agreement at all upon the width of territorial waters. Prior to 1930 it had been generally thought that, with the main exception of the Scandinavian claims to four miles, there would be a sufficient measure of agreement to settle three miles as the limit for territorial waters. Not only did the Hague Codification Conference of 1930 demonstrate the complete lack of agreement, but also two successive Conferences at Geneva in 1958 and 1960 failed to achieve the compromise of a maximum limit of six miles to territorial waters and a further extension up to twelve miles of a fishery zone from which, in time, all foreign fishing vessels would be excluded.<sup>1</sup>

Despite the stand taken by the United States, the United Kingdom and other states favouring the three mile limit, in view of the increasing number of states which by municipal legislation lay claim to territorial waters of six or twelve miles from the respective baselines, it has never been easy to accept the proposition that the limit of territorial waters remains three miles. It is unlikely that an international tribunal would declare a claim to six or twelve miles *ipso facto* illegal, although it might not be prepared to uphold a wider claim against a state which had consistently adhered to a lesser limit and which had effectively protested against the extensions to territorial waters.<sup>2</sup>

6-13. *Continental Shelf.*

Only in the last thirty years have technological advances made possible the exploitation of the natural resources contained in the continental shelf, that is, in the areas of land submerged beneath the shallow waters that surround most land masses.<sup>3</sup>

The Convention defined the continental shelf as applying "to the seabed and subsoil of the submarine areas adjacent to the coasts but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas" and "to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands." Although Article 2 provides that the coastal state exercises "Sovereign rights", it is clear from the rest of paragraph, which limits the rights to the exploration and exploitation of natural resources, that the term "sovereign" is designed to connote a general proprietary control, and not any precise authority based on sovereignty. Thus, while the continental shelf is reserved exclusively for the coastal state, the rights of the coastal state "do not affect the legal status of the superadjacent waters as high seas, or that of the airspace above those waters". In exploring and exploiting the seabed, the coastal state must not impede the laying or maintenance of cables or pipelines, nor should there be "unjustifiable interference" with navigation, fishing or conservation of living resources of the sea, nor "interference" with "fundamental" oceanographic or other scientific research. But, whenever installations are erected, the coastal state is entitled to establish safety zones up to a distance of 500 meters around such structures which ships of all nationalities must respect.<sup>4</sup>

1. Greig: *International Law*, p. 193.

2. *Ibid.*, p. 194.

3. *Ibid.*, p. 199-200.

4. *Ibid.*, p. 200.

The coastal state has limited rights over the continental shelf : its "sovereign rights" are limited to exploring the shelf and exploiting its natural resources (Article 2, Continental Shelf Convention). However, the measures taken by the coastal state in exploring and exploiting should be reasonable and must not otherwise "impede the laying or maintenance of submarine cables or pipelines on the continental shelf (Article 4). The rights of the coastal state are not to affect "the legal status of the superadjacent waters as high seas, or that of the airspace above those waters" (Article 3). Nevertheless, by Article 5, a state can construct on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources" and is entitled to establish safety zones around them. These zones, which can extend to a distance of 500 metres, must be respect by "ships of all nationalities". From the jurisdictional standpoint, therefore, the coastal state is only entitled to regulate matters pertaining to the exploration and exploitation of the continental shelf.<sup>1</sup>

#### 6:14. *Treaties about air space.*

The 1914-18 War, however, brought home to all states the significance of aerial transport and the potential dangers of aircraft to their security. Any doubts that might have existed were resolved by the forthright nature of Article, 1 of the Paris Convention of 1919. The High Contracting Parties recognised that every state had "complete and exclusive sovereignty over the air space above its territory," including its territorial waters. This basic principle was reaffirmed by Articles 1 and 2 of the Chicago Convention, 1944.<sup>2</sup>

Although jurisdiction in air space is stated to be based upon the "complete and exclusive sovereignty" of the territorial state, this sovereignty is by no means unqualified.<sup>3</sup>

The exclusive sovereignty concept of Article 1 is reinforced in the Chicago Convention by Article 6 which lays down that "no scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorisation of that state, and in accordance with the terms of such permission or authorisation." However, under Article 5, "aircraft of other contracting states, being aircraft not engaged in scheduled international air services, shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the state flown over to require landing."<sup>4</sup>

When the territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the results is the same. Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.<sup>5</sup>

1. Greig : *International Law*,

2. Greig : *International Law*, p. 348.

3. *Ibid.*

4. *Ibid.*

5. *Rajindra Chand v. Mst. Sukhl*, 1957 SC 286 (291).



**6.15. Act of State—Acquisition of territory—Effect of on rights of persons.**

The expression “act of State” is, not limited to hostile action between rulers resulting in the occupation of territories. It includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession. *Vide Nayk Vajesinghji Joravar Singhji v. Secy. of State*<sup>1</sup> and *Thakur Amar Singhji v. State of Rajasthan*.<sup>2</sup> And on principle, it makes no difference as to the nature of the act, whether it is acquisition of new territory by an existing State or as formation of a new State out of territories belonging to quondam States. In either case, there is establishment of new sovereignty over the territory in question, and that is an act of State.<sup>3</sup>

There is a distinction between an ‘act of State’ and what is a law of the State conferring right on the subject.

When the sovereign of a state—meaning by that expression, the authority in which the sovereignty of the State is vested, enacts a law which creates, declares, or recognises rights in the subjects, any infraction of those rights would be actionable in the Courts of that State even when that infraction is by the State acting through its officers. It would be no defence to that action that the act complained of is an act of State, because as between the sovereign and his subjects there is no such thing as an act of State, and it is incumbent on his officers to show that their action which is under challenge is within the authority conferred on them by law. Altogether different considerations arise when the act of the sovereign has reference not to the rights of his subjects but to acquisition of territories belonging to another sovereign. That is a matter between independent sovereigns, and any dispute arising therefrom must be settled by recourse not to municipal law of either States but to diplomatic action, and that failing, to force. That is an act of State pure and simple, and that is its character until the process of acquisition is completed by conquest or cession. Now, the status of the residents of the territories which are thus acquired is that until acquisition is completed as they are the subjects of the ex-sovereign of those territories and thereafter they become the subjects of the new sovereign. It is also well established that in the new set up these residents do not carry with them the rights which they possessed as subjects of the ex-sovereign and that as subjects of the new sovereign, they have only such rights as are granted or recognised by him.<sup>4</sup>

It follows from this that no act done or declaration made by the new sovereign prior to his assumption of sovereign powers over acquired territories can quoad the residents of those territories be regarded as having the character of a law conferring on them rights such as could be agitated in his Courts. In accordance with this principle, it has been held over and over again that clauses in a treaty entered into by independent rulers providing for the recognition of the rights of the subjects of the ex-sovereign are incapable of enforcement in the Courts of the new sovereign.<sup>5</sup>

In *Cook v. Spring*,<sup>6</sup> the facts were that the ruler of Pondoland in Africa had granted certain concessions in favour of the appellants and subsequently

1. 51 Ind. App. 357 (360): AIR 1924 PC 216 (217).

2. (1955) 2 SCR 303 (335): AIR 1955 SC 504 (523).

3. *D.D. Cement Co. Ltd. v. I. T. Commr.*, 1958 SC. 816 (822).

4. *Ibid.*, p. 823.

5. *Ibid.*

6. 1899 AC 572 (578).

ceded those territories to the British Government. The latter having declined to recognise those concessions the appellants sued for a declaration of their rights thereunder, and the question was whether they had a right of action in respect of what was an act of State. One of the contentions urged on their behalf was that the ruler of Pondoland had at the time of cession of his territories expressed his desire to the British Government that the concessions in favour of the appellants should be recognised and that, in consequence, the appellants had the right to enforce them against the new Government. In rejecting this contention, the Lord Chancellor observed :

"The taking possession by her Majesty, whether by cession or by any other means which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign which the appellants are compelled to do in deriving title from him. It is a well established principle of law that the transactions of independent States between each other governed by other laws than those which municipal courts administered."<sup>1</sup>

"It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect of such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against the sovereign in the ordinary course of diplomatic pressure."<sup>2</sup>

In decision of the Privy Council in this case and the decisions in similar other cases like *Secretary of State v. Sardar Rastam Khan*,<sup>3</sup> were followed by the Supreme Court in *Dalmia Dabri Cement Co. Ltd. v. C.I.T.*,<sup>4</sup> *State of Saurashtra v. Memon Haji Ismail*,<sup>5</sup> *Jagannath Agarwala v. State of Orissa*,<sup>6</sup> *State of Saurashtra v. Jamaidar Mohammad Abdulla*,<sup>7</sup> *Promod Chandra v. State of Orissa*,<sup>8</sup> *Prema Chhiber v. Union of India*,<sup>9</sup> *Vinod Kumar Shantila v. Gangadhar Nursinghdas*.<sup>10</sup>

A discordant note was struck by Bose, J. who spoke for the Court in *Virendra Singh v. State of Uttar Pradesh*,<sup>11</sup> but a seven judge Bench held by a majority, Subba Rao, J. dissenting, in *State of Gujarat v. Vora Fiddali*,<sup>12</sup> that *Virendra Singh's* case was decided wrongly. Five considered judgments were delivered in that case, four of which, on behalf of six learned judges, affirmed

1. *D.D. Cement Co. Ltd. v. I. T. Commr.*, 1958 SC 816 (823-24).

2. *Ibid.*

3. 1941 PC 64.

4. 1958 SC 816: 1969 SCR 729.

5. (1960) 1 SCR 537: 1959 SC 1383.

6. (1962) 1 SCR 205: 1961 SC 1361.

7. (1962) 3 SCR 970: 1962 SC 445.

8. (1962) Supp. 1 SCR 405: 1962 SC 1288.

9. (1966) 1 SCR 357: 1966 SC 442.

10. (1981) 4 SCC 226.

11. (1955) 1 SCR 415: AIR 1954 SC 447.

12. (1964) 6 SCR 461: AIR 1964 SC 1043.

the view of the Privy Council. Mudholkar, J. who delivered a separate judgment concurring with the majority on the point at issue before the court said :

“The rule of international law on which the several Privy Council decisions as to the effect of conquest or cession on the private rights of the inhabitants of the conquered or ceded territory are founded has become a part of the common law of this country”.<sup>1</sup>

The results of the authorities is that when a treaty is entered into by sovereigns of independent States whereunder sovereignty in territories passes from one to the other, clauses therein providing for the recognition by the new sovereign of the existing rights of the residents of those territories must be regarded as invested with the character of an act of state and no claim based thereon could be enforced in a court of law.

Covenants entered into by the rulers of the covenanting States by which they gave up their sovereignty over their respective territories were acts of state.

In *Dalmia Dadri Cement Co. Ltd. v. C.I.T.*<sup>2</sup> the point was with respect to a clause, in the agreement between the Ruler of the former Sind state and the Dalmia Cement Co. Ltd. with respect to income-tax and certain concession given to the company in that behalf. The question that arose in that connection was whether there had been any recognition of the concession by the new sovereign. The Covenant was signed by the rulers on 5.5.1948, whereas the new State came into being only on 20.8.1948. The ruler of the Patiala Union against whom Article VI was sought to be enforced was not a party to the Covenant at all, because that State had not come into existence on that date. The person who signed the Covenant was the ruler of the State of Patiala which was one of the Covenanting States but that state as well as the seven other States which entered into the Covenant stood all of them dissolved on 20.8.1948, when the new Patiala Union came into being. The new State could not and did not enter into any covenant before 20.8.1948 and therefore, it could not be held to be bound by Article VI to which it was not a party.<sup>3</sup>

The Court held that there was no recognition of the concessions. The concession had come to an end when an Ordinance No. 1 was passed.

In *State of Rajasthan v. Shyam Lal*<sup>4</sup> the case of Shyam Lal was that in 1947 certain commodities could only be exported from the former Dholpur State on export permits issued by the customs department of the said State. It was also the practice in that State that when permits for export were issued, export duties had to be paid in advance, though the actual export was made later. Consequently, in June, 1947, the respondent applied for and was granted a permit for export of 15,000 maunds of chuni, and in connection therewith he deposited Rs. 30,000/- as export duty in advance. This permit had been granted on June 28, 1947 and remained in force upto December 2, 1947. The respondent however was not able to export the entire quantity of 15,000 maunds for which the permit was granted; he could only export 4572 maunds and 20 seers of chuni before December 2, 1947. Thereafter he could

1. *Vinodkumar v. Gangadhar*, 1981 SC 1946 (1951), para 18.

2. *D.D. Cement Co. Ltd. v. I. T. Commr.*, 1958 SC 816 : 1959 SCR 729.

3. *Ibid.*, p. 825 Para 17.

4. 1964 SC 1495 (1496) and (1500).

not export further as his permit was not extended. It was alleged on behalf of the respondent that the reason why he failed to export the entire quantity of the commodity before December 2, 1947 was due to market conditions and inability to get allotment of railway wagons. The respondent's case further was that as he could not export the entire quantity of 15,000 maunds for which he had paid export duty in advance at the rate of Rs. 2/- per maund, he was entitled to refund of the proportionate export duty for the quantity of 10427 muands and 20 seers, which he could not export. His case further was that though he asked the State for refund of the advance duty, the State did not pay back the same to him. In the meantime rapid constitutional changes took place after August 15, 1947. By May 15, 1949, the United State of Rajasthan was formed including the Matsya Union into which the former State of Dholpur had merged on March 17, 1948. The United State of Rajasthan eventually become the Part B State of Rajasthan on January 26, 1950 when the Constitution came into force. Eventually when the State refused to refund the amount, the suit was filed. The respondent claimed refund of Rs. 20,855/- along with interest and costs. In these circumstances the Supreme Court held that the new sovereign throughout this process of integration from 1948 to 1950 must be taken to have recognised the rights of the subjects and undertaken the liability, if any, of the old States. Accordingly the State of Rajasthan was held liable under Art. 295 (2) of the Constitution to meet the liabilities of the old States which eventually were included in it subject always to this that if the new State passed any law repealing the old law which would affect the liability or even otherwise that law would prevail and the liability may disappear provided the new law was within the competence of the State Legislature and does not transgress the constitutional limitations after the Constitution came into force.

In *Maharaja Shree Umaid Mills Ltd. v. Union of India*<sup>1</sup>, there was an agreement between the Ruler of the former state of Jodhpur and the Maharaja Shri Umaid Mills Limited by which certain exemptions from income-tax and excise duty were granted to the Mills. The question that arose for decision, was whether income-tax could be levied on the income of the Mills, in view of the agreement between the Mills and the former Ruler of Jodhpur. Reliance was placed of Art. VI of the Covenant and it was urged that in view of Art. 295 of the Constitution the exemption as provided in the agreement continued. Even though the old laws were continued for the time being by Rajasthan Ordinance No. 1 of 1949 the new State passed the Rajasthan Excise Duties Ordinance 1949 sometime after. That Ordinance clearly applied to the Mills in view of that law, the exemption in the agreement was held not to have been affirmed by the new State of Rajasthan.

When one State is absorbed in another, whether by accession, conquest merger or integration, all contracts of service between the prior Government and its servants automatically terminate and thereafter those who elect to serve in the new State and are taken by it serve on such terms and conditions as the new State may choose to impose.<sup>2</sup> In *State of Madras v. Rajgopalan*,<sup>3</sup> it was held that the Indian Independence Act, 1947 allowed the essential structure of the Secretary of State Services with the result that the basic foundation of the contractual-cum-statutory tenure of the service disappeared. But the said principle would not apply to the case of reorganization of States in the same country.

1. 1963 SC 953 :

2. *Amar Singh v. State of Rajasthan*, 1958 SC 228 (230).

3. 1955 SC 817 (827).

When there is no change of sovereignty and it is merely an adjustment of territory as by the reorganisation of a particular State, the administrative orders made by the Government of the erstwhile state continue to be in force and effective and binding on the successor State until and unless they are modified, changed or repudiated by the Government of the successor States. The administrative orders made by the Government of the erstwhile State do not automatically lapse or rendered ineffective on the coming into existence of new successor States.<sup>1</sup>

#### 6-16. *Escheat.*

The Government has the right to take all property within its jurisdiction by escheat for want of an heir or successor and as *bona vacantia* for want of rightful owner.<sup>2</sup>

The Government takes by escheat immovable as well as movable property for want of an heir. Escheat is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction.<sup>3</sup> This right of the Government to take by escheat for want of an heir or successor or as *bona vacantia* for want of a rightful owner has been recognised in our country for a long time.<sup>4</sup> Statutes 16 and 17 Vict. clause 95 Section 27 provided that all real and personal estate within the territory of the Government of India escheating or lapsing for want of heir or Successor or as *bona vacantia* shall belong to East India Company in trust for Her Majesty for the service of the Government of India. By Section 54 of Government of India Act, 1858 the existing provisions were continued in force. The Government of India Act, 1915 Section 20 (2) (iii) provided that revenue of India would include all moveable and immoveable property escheating or lapsing for want of an heir.

#### 6-17. *Property of State.*

Section 174 of the Government of India Act, 1935 provided that any property in India accruing to His Majesty by escheat or lapse or as *bona vacantia* for want of rightful owner shall if it is property situate in a province, vest in His Majesty for the purposes of the Government of that Province, and shall in any other case vest in His Majesty for the purpose of the government of the Federation. Art. 296 of the Constitution now provides that "any property in the territory of India which, if this Constitution had not come into operation would have accrued to His Majesty; or as the case may be, to the Ruler of an Indian State, by escheat or lapse, of an Indian State, by escheat or lapse, or as *bona vacantia* for want of a rightful owner shall if it is property situate in a State, vest in such State and shall in any other case, vest in the Union."<sup>5</sup>

But if any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in possession or under the control of the Government of India or the Government of a State shall, according as the purpose for which it was then used or held were purposes of the Union or of a state, vest in the Union or in that State.<sup>6</sup>

1. *State of Punjab v. Balbir Singh*, 1977 SC 629 (635).

2. *Pierce Leslie & Co. v. Wapshare*, 1969 SC 843 (849); *Bombay Dyeing & Manufacturing Co. v. State of Bombay*, 1958 SCR 1122 (1146); *Remembrancer of Legal Affairs v. Corporation of Calcutta*, (1967) 2 SCR 170 (204); 1967 SC 997 (1016).

3. *Pierce Leslie & Co. v. Wapshare*, 1969 SC 843 (849).

4. *Ibid.*

5. *Ibid.*

6. *Ibid.*

Later on attempt was made under the States Reorganisation Act to rationalize the pattern of administration by reducing the four classes of units into two States, and Union territories and by making a majority of the States homogeneous linguistic units. But in the States so reorganized were incorporated regions governed by distinct laws, and by the mere process of bringing into existence reorganized administrative units, uniformity of laws could not immediately be secured. Administrative reorganisation evidently could not await adaptation of laws, so as to make them uniform, and immediate abolition of law which gave distinctive character to the regions brought into merging its political identity in the new unit, the distinctive character of each region till uniformity laws was secured in those branches in which it was expedient after full enquiry to do so. The laws of the regions merged in the, new units had therefore, to be continued on grounds of necessity and expediency. Section 119 of the States Reorganisation Act was intended to serve this a temporary purpose, *viz.*, to enable the new units to consider the special circumstances of the diverse units, before launching upon a process of adaptation of laws so as to make them reasonably uniform keeping in view the special needs of the component regions and administrative efficiency. Differential treatment arising out of the application of the laws so continued in different regions of the same reorganised State, did not therefore immediately attract the clause of the Constitution prohibiting discrimination. But by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid. A purely temporary provision which because of compelling forces justified differential treatment when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency, so as to perpetuate that treatment without a rational basis to support it after the initial expediency and necessity have disappeared.

The reorganized State of Madhya Pradesh was formed by combining territories of four different regions. Shortly after reorganisation, the Governor of the State issued the Madhya Pradesh Adaptation of Law (State and Concurrent Subjects) Order, 1956, so as to make certain laws applicable uniformly to the entire State and later the Legislature by the M. P. Extension of Laws Act, 1958, made other alterations in the laws applicable to the State. But Bhopal Act IX of 1953 remained unamended and unaltered : nor was its operation extended to other areas or regions in the State. Continuance of the laws of the old region after the reorganisation by Section 119 of the State Reorganisation Act was by itself not discriminatory even though it was intended to serve a dual purpose-facilitating the early formation of homogeneous units in the larger interest of the Union, and maintaining even while the new units was politically inexpedient even if theoretically possible. An attempt to secure uniformity of laws, before Reorganisation Act made a blanket provision in Section 119 continuing the operation of the laws in force in the territories in which they were previously in force notwithstanding the territorial reorganisation into different 'administrative units the competent legislature or authority amended, altered or modified those laws.

When territories forming part of one State or one area came to be transferred to and became part of territories under another State, provision had necessarily to be made for continuance of laws in force in the territory so transferred and for adaptation of laws to bring them in conformity with the new situation. Under the Constitution this power was invested in the President. Under the first State Reorganisation Act *i. e.* Act No. 37 of 1956, this power was vested in the appropriate Government under Section 120 of the Act. Similarly, under the Bombay Reorganization Act this power has been given to appropriate Government under Section 88.<sup>1</sup>

1. *Sri Ram Haribhan'y. Madhusudan*, 1968 Bom. 219 para 13.

Thus, the Constitution itself has given express power to Parliament to make law to make provision for consequential amendments, if any, for adaptations 'if any in' respect of the laws in force in any part of a State which after reorganization may form part of another territory. This power, in terms authorises the Parliament to make a provision like Section 120 of the first States Reorganisation Act or Section 88 of the Bombay Reorganisation Act which includes the power of adaptation to be exercised by Government to facilitate the continuance of the law in force in an appropriate manner.<sup>1</sup>

1. 1968 Bom 219, para 13.

# 7

## Citizenship

### SYNOPSIS

- 7·1. Citizen...meaning of.
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- 7·3. Aliens & Citizens.
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#### **7·1. Citizen—meaning of.**

The territory must be inhabited in order to form a state. The population of a state may be viewed as citizens, that is, a member of the State, entitled to the privileges that result from membership therein and as subjects, that is, as persons over whom the authority of the state is exercised and to whom its commands are addressed. As Rousseau puts it the individuals who compose the State are known as citizens in so far as they share in the sovereign



authority, and as subjects in so far as they owe obedience to the laws of the State while full membership is necessary for full membership in the State, there may also be found residing in the territory of the State persons who are not citizens but who receive the protection of the State.<sup>1</sup> Citizenship is a relationship between an individual and a State originating under terms prescribed by the law of that State and giving rise to certain duties and rights which such law attaches to citizenship. Citizenship also denotes the individual's status of being thus related to a State, *i.e.*, of being its citizen.

The term "citizen" as understood in our law is precisely analogous to the term "subject" in the common law of England, and the change of phrase has entirely resulted in from the change of Government. The sovereignty has been transferred from one (the crown) to the collective body of the people and one who before was a subject of the (crown King) is now a citizen of the State.<sup>2</sup>

Kent in his commentaries speaking of the general decision of the inhabitants of every country under the comprehensive title of aliens and natives says "subject" and citizens are : in a degree convertible terms as applied to natives; and the term "citizen" seems to be appropriate to republican freeman; yet we are equally with the inhabitants of all other countries, subjects, for we are equally bound by allegiance and subjection to the Government and law of the land.<sup>3</sup>

"Citizens" are the members of the political community to which they belong. They are the people who compose the community and who in their associated capacity, have established and submitted themselves to the dominion of a Government for the promotion of their general welfare and the protection of their individual as well as their collective rights.<sup>4</sup>

### 7.2. *Citizenship & Nationality.*

The terms 'citizenship' and 'nationality' refer to the status of the individual in his relationship to the State and are often used synonymously. The word 'nationality', however, has a broader meaning than the word 'citizenship'. Likewise the terms 'citizen' and 'national' are frequently used interchangeably. But here again the latter term is broader in its scope than the former. The term 'citizen', in its general acceptance is applicable only to a person who is endowed with full political and civil rights in the body politic of the State. The term 'national' includes a citizen as well as a person who though not a citizen, owes permanent allegiance to the State and is entitled to its protection.<sup>5</sup>

### 7.3. *Aliens & Citizens.*

The Constitution protects the aliens from deprivation of life, liberty or property without due authority of law. Even one whose presence in our country is unlawful, involuntary, or transitory is entitled to that constitutional protection. The fact that all persons, aliens and citizens alike are protected, does not lead to the further conclusion that all aliens are entitled to enjoy all

1. Gettele : *Political Science*, p. 20.
2. *United States v. Wong Kim*, 42 L. Ed. 890 (896).
3. *Kent's Commentaries on American Law*, Vol. 2, p. 298 :
4. *United States v. Cruckshank*, 26 L. Ed., p. 588.
5. *Hackworth Digest*, Vol. 3, p. 1.

the advantage of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.

#### 7.4. Principles of Citizenship.

Citizenship at birth is decided by one of two principles (original or naturalised) or by combination of both. In accordance with the principle of *jus sanguinis*, the nationality of a child follows that of his parents, or one of them, regardless of the place of birth. In accordance with principle of *jus soli*, nationality is determined by the place of birth regardless of the citizenship of the parents. The principle of *jus soli* has an advantage in the fact that citizenship is easily proved, but it is illogical and unsatisfactory. The principle of *jus sanguinis* lacks the advantage of easy proof, but is in general more natural and reasonable.<sup>1</sup> The Indian Constitution combines both the principles in Articles 5 and 6.

#### 7.5. Domicile—Meaning of.

Citizenship has reference to the political status of a person, and domicile to his civil rights.<sup>2</sup> In *Udny v. Udny*<sup>3</sup> Lord Westbury observed :

“The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states or conditions ; one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries ; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determinenes his majority or minority, his marriage succession, testacy or intestacy, must depend.”

Under the Constitution Article 5 which defines citizenship, itself proceeds on the basis that it is different from domicile, because under the Article, domicile is not by itself sufficient to confer on any person the status of a citizen of this country.<sup>4</sup>

When we speak of a person as having a domicile of a particular country, we mean that in certain matters such as succession, minority, and marriage he is governed by the law of that country.<sup>5</sup>

Domicile has reference to the system of law by which a person is governed, and when we speak of the domicile of a country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage might not be the same all over the country, and the different areas in the State might have different laws in respect of those matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile.<sup>6</sup>

1. Gettell : *Political Science*, p. 268-69.

2. *Hackworth Digest*, Vol. 3, p. 1. ; *D. P. Joshi v. State of M. P.*, 1955 S. C. 334 (337).

3. (1869) LR 1 Sc & Div 441 (457).

4. *D. P. Joshi, v. State of M. P.*, 1955 SC 334 (338).

5. *Ibid.*, p. 338.

6. *Ibid.*

Under the Constitution, the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is, therefore, quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States.<sup>1</sup>

Domicile of a person means his permanent home. Domicile means the place which a person has fixed as a habitation of himself, and his family not for a mere special and temporary purpose, but with a permanent intention of making his permanent home.<sup>2</sup>

The traditional statement that, to establish domicile, there must be a present intention of permanent residence merely means that so far as the mind of the person at the relevant time was concerned, he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present. If the inquiry relates to the domicile of the deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country.<sup>3</sup> One has to consider the tastes, habits, conduct, actions, ambitions, health, hopes and projects of a person because they are all considered to be keys to his intention to make a permanent home in a place.<sup>4</sup>

“Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom the purposes for which and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions.”<sup>5</sup>

Every person must have a domicile. A person cannot have two simultaneous domiciles.<sup>6</sup>

The law attributes to every person at birth a domicile which is called a domicile of origin. The domicile of origin is determined by the domicile, at the time of the Child's birth of that person upon whom he is legally dependent. A legitimate child born in wedlock to a living father receives the domicile of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time.<sup>7</sup>

Domicile of origin may be changed and a new domicile, which is called a domicile of choice acquired; but the two kinds of domicile differ in one respect. The domicile of origin is received by operation of law at birth, the domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his *animus manendi*.<sup>8</sup>

As regards change of domicile; any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice

1. *D. P. Joshi v. State of M. P.*, 1955 S. C. 334 (339).

2. *Abdus Samad v. State of West Bengal*, 1973 SC 505 (506).

3. Cheshire: *Private International Law*, 8 Ed., p. 164.

4. *Shankaran v. Lakshmi*, 1974 SC 1764 (1769); *Winans v. Att. General*, 1904 AC 287.

5. *Shankaran v. Lakshmi*, 1974 SC 1764, (1775); *Ross v. Ross*, 1930 AC 1 (6) per Lord Buckmaster.

6. *Abdus Samad v. State of W.B.*, 1973 SC 505 (506).

7. *Kedar Pandey v. Narain Bikram Sah*, 1966 SC 160 (163).

8. *Ibid.*,

by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. For this purpose, residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character, nor its duration is in any way material. The state of mind or *animus manendi*, which is required demands that the person whose domicile is the object of the enquiry should have formed a fixed and settled purpose of making his principle or sole permanent home in the country of residence, or, in effect he should have formed a deliberate intention to settle there.<sup>1</sup> In other words, the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. To effect this abandonment of the domicile of origin, and substitute another in its place, it required *animo et facto* that is, the choice of place, actual residence in the place then chosen and that it should be the principal and permanent residence. In fact, there must be both residence and intention. Residence alone has no effect, *per se*, though it may be most important as a ground from "which to infer intention."<sup>2</sup> The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown.<sup>3</sup>

If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency, will not prevent such a residence in a foreign country from putting an end to his domicile of origin. But a residence in a foreign country for pleasure lawful or illicit, which residence may be changed at any moment, without the violation of any duty, and is accompanied by an intention of going back to reside in the place of birth, on the happening of an event which in the course of nature must speedily happen, cannot be considered as indicating the purpose to live and die abroad.<sup>4</sup>

"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute domicile and not a definition of the term. There must be residence freely chosen and not prescribed or dictated by any external necessity such as the duties of office, the demands of creditors, or the relief from illness, and it must be a residence fixed, not for limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose or *animus manendi*, can be inferred, the fact of domicile is established."<sup>5</sup>

The only intention required for a proof of a change of domicile is an intention of permanent residence. In other words, what is required to be established is that the person who is alleged to have changed his domicile of origin has voluntarily fixed the habitation for himself and his family, in the

1. *Kedar Pandey v. Narain Bikram Sah*, 1966 S. C. 160 (163).

2. *Munro v. Munro*, (140) 7 Cl. and Fin 842 (876) per Lord Cottenham.

3. *Kedar Pandey v. Narain Bikram Sah*, (1965) 3 SCR 793 : 1966 SC 160 (163).

4. *Aikman v. Aikman*, (1861) 3 Macq. HLC 854 ; *Kedar Pandey v. Narain Bikram Sah*, 1966 SC 160 (164).

5. *Udny v. Udny*, LR 1 Sc. & Div. 441.

new country not for a mere special or temporary purpose but with a present intention of making it his permanent home.<sup>1</sup>

For considering the domicile of a particular person on the date of the coming into force of the Constitution, his conduct and facts and circumstances subsequent to the time should also be taken into account.<sup>2</sup> *In re Grove ; Voucher v. The Solicitor to the Treasury*,<sup>3</sup> the domicile of one Mare Thomegay in 1744 was at issue and various facts and circumstances after 1744 were considered to be relevant. Lopes, L. J. there stated : "I have always understood the law to be that in order to determine a persons intention at a given time, you may regard not only conduct and acts before and at the time ; but also conduct and acts after the firm assigning to such conduct and act their relative and proper weight of cogency."

The *onus* of proving that domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost.<sup>4</sup>

#### 7.6. *Municipal Laws to determine citizenship.*

It is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.<sup>5</sup>

#### 7.7. *Citizenship at the commencement of the Constitution—Articles 5 to 10.*

What is the legal significance of the term citizen ? It has not been defined in the Constitution. Part II of the Constitution deals with citizenship at the commencement of the Constitution. Articles 5 to 10 deal with who shall be regarded as a citizen of India.

#### 7.8. *Articles 5 & 6.*

By Article 5 of the Constitution every person who had his domicile in the territory of India (as defined in Article 1 (3) of the Constitution and ; (a) who was either born in the territory of India ; or (b) either of whose parents was born in the territory of India ; (c) or who had been ordinarily resident in the territory of India for not less than five years immediately preceeding such commencement was a citizen of India. This is the basic rule conferring citizenship at the commencement of the Constitution upon every person who had his domicile in the territory of India and who satisfied one or more of the three conditions in Article 5. But Article 5 was not exhaustive of the conditions in which citizenship of India could be claimed at the commencement of the Constitution. Persons who did not satisfy the requirements of Article 5 could still be citizens. By Article 6 a person who has migrated to the territory of India from the territory now included in Pakistan would be deemed to be a citizen of India at the commencement of the Constitution if he satisfied two condition that (a) he or either of his parents or any of his grand parents was born in India as defined in the Government of India Act, 1935 ; and that (b) he had either migrated before July 19, 1948, and had ordinarily been resident in the

1. *Kedar Pandey v. Narain Bikram Sah*, 1966 SC 160: (1965) 3 SCR 793.

2. *Ibid.*, p. 165.

3. 1889 LR 40 Ch D 216.

4. *Kedar Pandey v. Narain Bikram Sah*, 1966 SC 160 (164): (1965) 3 SCR 793.

5. *United States v. Wonskim Ask*, 42 L. Ed. 890. (897).

territory of India since the date of his migration or where he had migrated after July 19, 1948, he had been registered as a citizen of India by an officer appointed in that behalf. A person who could not claim to be a citizen of India under Article 5 could still be deemed to be a citizen of India if the conditions mentioned in Clause (a) and either of the conditions in Clause (b) of Article 6 were satisfied. Article 7 engrafts an exception both upon Articles 5 and 6. A person who would have been a citizen of India because he satisfied the conditions of Art. 5 or who would be deemed to be a citizen of India because he satisfied the requirements of Article 6, would still not be deemed to be a citizen of India, if he had after the first day of March 1947, migrated from the territory of India to the territory included in Pakistan returned to the territory of India under a permit for resettlement or permanent return.<sup>1</sup>

Article 6, therefore, confers citizenship upon a person in the conditions mentioned therein who would otherwise not be entitled to that status under Article 5, whereas Article 7 disables a person from claiming the status notwithstanding that he otherwise complies with the requirements of Article 5 or Article 6 if he had after the specified date migrated from the territory of India to the territory of Pakistan. Article 6 deals with migration into India which confers citizenship and Article 7 deals with migration from India which disables a person from claiming citizenship of India at the commencement of the Constitution. The expression "migrated" could have different meanings in the two Articles.<sup>2</sup>

#### 7-9. Article 7, Migration—Meaning of.

In October or November, 1947, men's minds were in a state of flux. The partition of India and the events that followed in its wake in both Pakistan and India were unprecedented and it is difficult to cite any historical precedent for the situation that arose. Minds of people affected by this partition and who were living in those parts, were completely unhinged and unbalanced and there was hardly any occasion to form intentions requisite for acquiring domicile in one place or another. People vacillated and altered their programmes from day to day as events happened. They went backward and forward; families were sent from one place to another for the sake of safety.<sup>3</sup> "Most of those displaced from West Pakistan had no permanent homes in India where they could go and take up abode. They overnight became refugees, living in camps in Pakistan or in India. No one, as a matter of fact at the moment thought that when he was leaving Pakistan for India or *vice versa* that he was doing so for ever or that he was for ever abandoning the place of his ancestors."<sup>3</sup>

The word "migrated" is capable both of a narrower meaning as well as of a wider meaning. In its narrower connotation it means going from one place to another with the intention of residing permanently in the latter place; in its wider connotation it simply means going from one place to another whether or not with any intention of permanent residence in the latter place. Dictionary meaning of the word "migrate" means "to go from one place to another; especially to move from one country, region or place or abode or sojourn to another, with a view to residence; to move. 'to change one's place of residence'". It will be seen that if the narrower meaning is given an intention to settle in the

1. *Kulathil v. State of Kerala*, 1966 SC 1614 (1622).

2. *Ibid.*

3. *Kulathil v. State of Kerala*, 1966 SC 1614 (1617) Para 7.

place to which a person moves on migration is necessary. On the other hand if the wider meaning is given all that is necessary is that there should be movement from one place to another whether or not there is any intention of settlement in the place to which one moves.”

The word “migrate” is used in more senses than one : In some contexts it means movement from one region or country to another implying intention to settle in a new land permanently : it in other contexts means movement from one place to another without an intention to settle permanently in that other place.

In *Shanno Devi v. Mangal Sain*.<sup>1</sup> the dispute arose in an election case, Mangal Sain who was born in 1927 of Indian parents in the territory which since August 15, 1947 had become part of Pakistan, moved in 1944 to Jullunder, and thereafter lived in the territory which was part of India, except for a short period when he went to Burma. It was contended in an election dispute that Mangal Sain was not a citizen of India and, therefore, could not stand for election. That contention was rejected by the Court on the finding that there respondent Mangal Sain who had earlier moved from a place in Pakistan to Jullunder had definitely made up his mind to make India his permanent home and, therefore, he satisfied the first requirement of Art. 6 after migration to the territory of India from the territory now included in Pakistan and it being established that Mangal Sain was born in India as defined in the Government of Cl. (a) of Art. 6. The Court in that case regarded movement from one territory to another, with intention to to reside permanently in the new territory as a necessary ingredient.

During 1947-48 there were many cases where people had migrated to Pakistan and then came back to India and claimed citizenship of India. In this connection question arose as to what in the meaning of the word migrate in Article 7 of the constitution. In *State of Bihar v. Amar Singh*,<sup>3</sup> the question was whether one Kumar Rani Sayeeda Khatton was, because of migration from the territory of India after March, 1, 1947, not to be deemed a citizen of India. Kumari Rani who was born in the territory of India and had married Captain Mahataj Kumar Gopal Saran Narayan Singh of Gaya in 1920 left for Karachi in July 1948 and returned to India in December 1948 on a temporary permit. She again left for Pakistan in April 1949 on the expiry of the permit. Her claim that she went to Pakistan temporarily for medical treatment was not accepted. She obtained a permit for permanent return and came to India in 1950. This permit was later cancelled, and she was directed to leave India. In a petition filed before the High Court of Patna it was declared that Kumar Rani was a citizen of India and the order directing her to leave India was set aside. The Supreme Court reversed the order of the High Court holding that since Kumar Rani had migrated from the territory of India to the territory of Pakistan, she had disqualified herself from claiming citizenship of India. The facts proved in *Kumar Amar Singh's* case, disclose that there was no evidence tending to show that Kumar Rani had entertained at any time before the commencement of the Constitution an intention permanently to reside in Pakistan. Her husband was in India, her property was in India and she had gone to Pakistan for about eight months in the year 1948 and thereafter in April 1949. The Court did not accept the view that to attract Art. 7, migration from the territory of India must be

1. *Kutathil v. State of Kerala*, 1966 SC 1614.

2. (1961) 1 SCR 576: AIR 1961 SC 58.

3. (1955) 1 SCR 1259 : AIR 1955 SC 282.

with an intention permanently to reside in the territory now included in Pakistan. This case shows that if migration was voluntary and not with a specific purpose and for a short and limited period, Art. 7 would apply irrespective of the fact whether the migration was with the intention of residing permanently in the place to which the person migrated."

In *Kulathil v. State of Kerala* one contention on behalf of Aboobacker was that Art. 7 had no application because migration contemplated in the Article must be with the intention to leave India permanently and settle finally in Pakistan and that as Aboobacker or as a minor at the time he left India he could not be imputed with any such intention and in any case he had no such intention because he had simply to Karachi in search of livelihood. The Supreme Court by majority held that the narrower meaning given to the word "migrated" in *Shanno Devi's*<sup>3</sup> case as used in Art. 6 was not correct and that the word used in Arts. 6 and 7 had the wider meaning, namely, coming or going from one place to another, whether or not with the intention of residence in the latter place, subject to the qualification that the movement should have been voluntary and should not have been for a specific purpose and for a short and a limited period. A case where a person went on what may be called a visit from the territory of India to the territory of Pakistan for a short and a limited period with a specific purpose would not be covered by the word "migrated" as used in Art. 7. Similarly a case where a person was forced to go from the territory of India to the territory of Pakistan as, for example, where he might have been kidnapped or abducted would not be covered by the word 'migrated' as used in Art 7.<sup>4</sup>

Since the decision of the Supreme Court in *Kulathil Mammu v. State of Kerala*,<sup>5</sup> it is the view of the Supreme Court that migration in its wider connotation going from one place to another whether or not with the intention of permanent residence in that place.<sup>6</sup>

Both the Articles 6 and 7 are silent on the question of domicile and the presence of the *nonobstante* clause in the beginning of these Articles clearly shows that the concept of domicile was not to be brought into there when deciding who shall be deemed citizens of India (Article 6) or who shall not be deemed citizens of India (Article 7) notwithstanding that such concept was present in Article 5. These two Articles make special provisions for dealing with the abnormal situation created by large movement of population from one side to the other and *vice versa* and lay down special criteria of their own, in one case for deciding, who shall be deemed to be citizens of India and in the other case who shall not be deemed to be such citizen.<sup>7</sup>

#### 7-10. Article 8.

Notwithstanding anything in Article 5, any person who are either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and who was ordi-

1. 1966 SC 1614.
2. 1966 SC 1614 (1618).
3. *Shanno Devi v. Mangal Sain*, 1961 SC 58.
4. 1966 SC 1614.
5. 1966 SC 1614.
6. *Abdus Samad v. State of West Bengal*, 1973 SC 505 (506).
7. 1966 SC 1614 (1616).



narly residing in any country outside India as so defined shall be deemed to be a citizen of India if he had been registered as a citizen of India by the diplomatic or consular representative of India in the country where he was for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of the Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.<sup>1</sup>

### 7-11. Article 9.

No person could be a citizen of India by virtue of Article 5, or be deemed to be citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.<sup>2</sup>

A "Foreign State" means any state other than India,<sup>3</sup> but subject to any law made by Parliament, the President may by order declare any state not to be a foreign state for such purposes as may be specified in the order.<sup>4</sup> By the Constitution (Declaration as to Foreign States order 1950) issued on January 24, 1950 every country with in the Common-wealth was declared not to be a Foreign State for the purposes of the Constitution.

In dealing with the cases falling under Art. 9 it is necessary to take recourse to the relevant provisions of the Citizenship Act 1955, and rules framed thereunder. In *Izhar Ahmed Khan v. Union of India*<sup>5</sup> it was held by the Supreme Court that Rule 3 of Schedule III, framed under Section 9 (2) of the Citizenship Act was valid, and so, whenever a question as to whether a person had acquired the citizenship of a foreign State fell to be considered, the jurisdiction to decide that question would vest exclusively in the Government of India, and in determining the said question the Government of India as prescribed by the relevant rules, it would not be open to any State to prosecute the said person on the basis that he had lost his citizenship of India and had acquired the citizenship of a foreign country. A decision by the Government of India, is a condition precedent in that behalf.<sup>6</sup>

Article 7 came up for consideration in *State of Madhya Pradesh v. Peer Mohd.*<sup>7</sup> And it was held that it did not apply to a case of acquisition of foreign citizenship after the Constitution came into force but only applied to such cases where foreign citizenship was acquired before the Constitution commenced. By oversight however in *Abdul Sattar Haji Ibrahim Patel v. State of Gujarat*,<sup>8</sup> it has been stated that cases in which migration had taken place after January 26, 1950 fall to be considered under Art. 9 of the Constitution. Article 9 does not use the word "migration" and deals only with voluntary acquisition of citizenship of a foreign State before the Constitution came into force as already decided in *Peer Mohd's*

1. Constitution of India, Art. 8.

2. Constitution, Art. 9.

3. Constitution, Art. 367 (3).

4. *Ibid.*

5. AIR 1962 SC 1052.

6. *Abdul Sattar v. State of Gujarat*, 1965 S C 813, para 9; vide *Government of Andhr Pradesh v. Mohd. Khan*, AIR 1962 SC 1778.

7. (1963) Supp. (1) SCR 429; AIR 1963 SC 645.

8. AIR 1965 SC 810.

case.<sup>1</sup> We have thought it fit to refer to Art. 9 to *Sattar* case.<sup>2</sup> Cases of voluntary acquisition of foreign citizenship after the commencement of the Constitution have to be dealt with by the Government of India under the Citizenship Act, 1955.<sup>3</sup>

In *Abdul Sattar v. State of Gujarat*,<sup>4</sup> the appellant is being prosecuted under Section 14 of the Foreigners Act, 1946 (XXXI of 1946). In determining the question as to whether he is a foreigner within the meaning of the said Act or not, Section 9 of the said Act will have to be borne in mind. Section 9 applies to all cases under the Act which do not fall under Section 8, and this case does not fall under Section 8, and so, Section 9 is relevant. Under this section, the legislature has placed, the burden of proof on a person who is accused of an offence punishable under Section 14. This section provides *inter alia* that where any question arises with reference to the said Act, or any order made, or direction given thereunder, whether any person is or is not a foreigner, the *onus* of proving that such a person is not a foreigner, shall notwithstanding anything contained in the Indian Evidence Act, lie upon such person : so that in the present proceedings in deciding the question as to whether the appellant was an Indian citizen within the meaning of Art. 5, the *onus* of proof will be to be placed on the appellant to show that he was domiciled in the territory of India on January 26, 1950 and that he satisfied one of the three conditions prescribed by cls. (a) (b) and (c) of the said Article. It is on this basis that the trial of the appellant will have to proceed.

#### 7-12. Article 10.

Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.<sup>5</sup>

#### 7-13. Article 11—Citizenship Act.

Art. 11 of the Constitution provides that nothing in Articles, 5 to 10 shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.<sup>6</sup>

The Parliament enacted the Citizenship Act 57 of 1955 : under the Act Indian Citizenship is acquired by birth,<sup>7</sup> by descent,<sup>8</sup> by registration,<sup>9</sup> and by incorporation of territory<sup>10</sup>.

1. (1963) Supp. (1) SCR 429: AIR 1963 SC 645.

2. AIR 1965 SC 810.

3. *Kulathi v. State of Kerala*, 1966 SC 1619.

4. *Abdul Sattar v. State of Gujarat*, 1965 SC 810 (813).

5. Constitution, Art. 10.

6. Constitution, Art. 11 See Sections 3 to 10 of the Citizenship Act, 1955 and the Citizenship Rules, 1956.

7. Section 3.

8. Section 4.

9. Section 5.

10. Section 6.

Every person born in India on or after 26th January, 1950 shall be a citizen of India unless if at the time of his birth his father possessed such immunity from such and legal process as was accorded to an envoy of a foreign sovereign power accredited to the President of India and was not a citizen of India, or his father was an enemy alien and the birth occurred in a place then under occupation by the enemy.<sup>1</sup>

A person born outside India on or after the 26th January, 1950 shall be a citizen by descent if his father was a citizen of India at the time of his birth. But if the father of such a person was a citizen of India by descent only that person shall not be a citizen of India unless his birth was registered at an Indian consulate within one year of its occurrence, or at the commencement of the Citizenship Act whichever is later, or with the permission of the Central Government after the expiry of such period of, if his father was, at the time of his birth, in service under a Government of India.<sup>2</sup>

Persons belonging to any of the following categories who are not already citizens of India by virtues of the Constitution or by virtue of any of the provisions of the Citizenship Act may apply to the prescribed authority for being registered as a citizen of India.

Person of Indian origin (*i.e.* if he or either of his parents or any of his grand parents) was born in undivided India (1) who are ordinarily resident in any country or place outside undivided India,<sup>3</sup> or (2) who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration,<sup>4</sup> (3) Women or (4) minor children of persons who are citizens of India, and (5) persons of full age and capacity who are citizens of a country specified in Schedule I to the Act.

No person being of full age shall be registered as a citizen of India until he has taken the oath of allegiance in the prescribed form.<sup>5</sup> No person who has renounced or has been deprived of his Indian citizenship or his Indian citizenship has been terminated under the Act, shall be registered as a citizen of India except by order of the Central Government.<sup>6</sup>

#### 7-14. *Citizenships by naturalization.*

Naturalization is the act of adopting a foreigner and clothing him with the privileges of a native citizen.<sup>7</sup> Any person of full age and capacity who is not a citizen of a country specified in the first schedule may apply in the prescribed manner for the grant of a certificate of naturalization<sup>8</sup> the Government of India may, if satisfied that the applicant is qualified for naturalization grant him a certificate of naturalization under the third schedule. If in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the third schedule.<sup>9</sup>

1. *The Citizenship Act*, Section 3 (2) (a) (b).
2. Section 4 (1), Proviso (a) (b).
3. Section 5 (1) (b).
4. Section 5 (1) (a).
5. Section 5 (2).
6. Section 5 (3).
7. *Blacks : Law Dictionary*, 4th Ed. p. 1178.
8. *The Citizenship Act*.
9. Section 6, Proviso.

The person to whom a certificate of naturalization is granted, shall on taking the oath of allegiance in the prescribed form, be a citizen of India by naturalization as from the date on which that certificate is granted.<sup>1</sup> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship, must be treated as granted upon condition, that the government may challenge it and demand its cancellation unless issued in accordance with such requirements.<sup>2</sup> This insistence on strict compliance with the statutory conditions precedent to naturalisation is simply an acknowledgment of the fact that Parliament alone has the constitutional authority to prescribe rules for naturalization.<sup>3</sup> Before sustaining any decision to impose the grave consequences of denaturalization, the courts have regarded it as their duty to scrutinize the record with the utmost care construing the facts and the law as far as is reasonably possible in favour of the citizen.<sup>4</sup>

The individual seeks to retain his citizenship right to full and equal status in our national community, a right conferring benefits of inestimable value upon those who possess it. The freedoms and opportunities secured by the Indian citizenship have been treasured by persons fortunate enough to be born with them. Indeed citizenship has been described as man's basic right for it is nothing less than the right to have rights and the effects of its loss justly have been called more serious than a taking of one's property, or the imposition of a fine or other penalty."<sup>5</sup>

Any citizen of India of full age and capacity who is also a citizen or national of another country may renounce his Indian Citizenship by giving a declaration to the effect in the prescribed form. Upon registration of that declaration he shall cease to be a citizen of India where made person cease to be a citizen of India every minor child of that person there upon cease to be a citizen of India.

### 7.15. Citizens—The rights and obligations.

The term citizen as understood in our law is precisely analogous to the term "subject" in the common law of England. Under our Constitution there are Citizens but no subjects.<sup>6</sup>

Citizens are the members of the political community to which they belong. They are the people who compose the community and who in their associated capacities, have established or submitted themselves to the dominion of, a government for the promotion of their general welfare, and the protection of their individual as well as their collective rights.<sup>7</sup>

A citizen is free to reside abroad indefinitely without suffering loss of citizenship. But the Government of India, possesses the power, inherent in sovereignty to require the return to India, of a citizen resident elsewhere, whenever the public interest requires it, and to penalise him in case of refusal.<sup>8</sup>

Constitutional rights of Citizens of India are not lost by a temporary absence from India and they are entitled, when they return, to all the

1. *The Citizenship Act*, Section 6 (2).
2. *United States v. Ginsberg*, 61 L. ed. 853.
3. *Fedorenko v. United States*, 66 L. ed. 2d 686 (701).
4. *Ibid.*, p. 711.
5. *Ibid.*, p. 711.
6. *Cheskola v. Georgia*, 11 L. ed. 440.
7. *United States v. Gruikshank*, 23 L. ed. 588.
8. *Blackmet v. United States*, 76 L. ed. 375.

protection which they had when they left.<sup>1</sup> An Indian Citizen owes allegiance to India wherever he may reside.

Absent War, there is no way to keep a Citizen from travelling within or without the country unless there is power to detain him. A Citizens right of exit can be regulated only in pursuant to the lawmaking functions of the Parliament. As Citizenship is membership in a political society it implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. There are reciprocal obligations one being compensation for the other.<sup>2</sup>

Every citizen owes the duty according to his capacity to support and defend the Government, Central and State against all enemies.

#### 7-16. *Fundamental Duties.*

By the 42nd Amendment of the Constitution, adopted in 1976, fundamental duties of the citizens were enumerated. Article 51-A in Part IV A prescribed the Fundamental Duties :

The Fundamental Duties are:

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

No penalty has been prescribed for dereliction of any of the duties and so long the breach of any of the duties is made penal or a crime, the Duties will remain only moral principles without any sanction.

1. *United States v. Ju Toy*, 49 L. ed. 1044 (Dissent).

2. *Luria v. United States*, 58 L. ed. 101 (105) :

**7-17. Loss of Citizenship.**

Citizenship is not a license that expires upon misbehaviour. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war the citizen's duties include not only the military defense of the Nation but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, his fundamental right of citizenship is secure.<sup>1</sup>

In *Trop v. Dulles*, Warren, C. J. said :

"We believe that use of denationalization as punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself."

**7-18. Corporation—No a citizen.**

A Corporation may claim a nationality which ordinarily is determined by the place of its incorporation. But the question still remains whether "nationality" and "citizenship" are interchangeable terms. "Nationality" has reference to the jural relationship which may arise for consideration under international law. On the other hand "Citizenship" has reference to the jural relationship under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civil rights under municipal law. Hence all citizens are nationals of a particular State but all nationals may not be citizens of the State. In other words citizens are those persons who have full political rights as distinguished from nationals may not be citizens of the State. In other words citizens are those persons who have full political rights as distinguished from nationals who may not enjoy full political rights and are still domiciled in that country.<sup>3</sup>

A corporation may have nationality in accordance with the country of their incorporation; but that does not necessarily confer citizenship on them. Part II of the Constitution when it deals with citizenship refers to natural persons only. This is further made absolutely clear by the Citizenship Act which deals with citizenship after the Constitution came into force and confines

1. Pritchett : *American Constitutional Issues*, p. 447-48.

2. 2 L. ed. 2d 630.

3. *State Trading Corporation of India v. Commercial Tax Officer*, 1963 SC 1811 (1819).

it only to natural persons. These cannot be citizens of this country who are neither to be found within the four-corners of Part II of the Constitution or within the four-corners of the Citizenship Act. These two provisions are completely exhaustive of the citizens of this country. Part II dealing with citizens on the date the Constitution came into force and the Citizenship Act dealing with citizens thereafter. The fact that corporations may be nationals of the country for purposes of international law will not make them citizens of this country for purposes of municipal law or the Constitution. The word "citizen" used in Article 19 of the Constitution was not used in a different sense from that in which it was used in Part II of the Constitution.<sup>1</sup>

The question may be looked at from another point of view. Article 19 lays down that all citizens shall have the right to freedoms enumerated in clauses (a) to (g). Those freedoms, each and all of them, are available to "all citizens". The Article does not say that those freedoms, or only such of them as may be appropriate to particular classes of citizens shall be available to them. If the Court were to hold that a corporation is a citizen within the meaning of Article 19, then all the rights contained in clauses (a) to (g) should be available to a corporation. But clearly some of them, particularly those contained in clauses (b), (d) and (e) cannot possibly have any application to a corporation. It is thus clear that the rights of citizenship envisaged in Article 19 are not wholly appropriate to a corporate body. In other words, the rights of citizenship and the rights flowing from the nationality or domicile of a corporation are not coterminous. It would thus appear that the makers of the Constitution had altogether left out of consideration juristic persons when they enacted Part II of the Constitution relating to "citizenship", and made a clear distinction between "persons" and "citizens" in Part III of the Constitution. Part III, which proclaims fundamental rights, was very accurately drafted, delimiting those rights like freedoms of speech and expression, the right to assemble peaceably, the right to practice any profession, etc., as belonging to "citizens" only and those more general rights like the right to equality before the law, as belonging to "all persons".<sup>2</sup>

In *S. T. Corporation v. Commercial Tax Officer*<sup>3</sup> on an examination of the relevant provisions of the Constitution and the Citizenship Act the Supreme Court reached the conclusion that they did not contemplate a corporation as a citizen.

It is not possible to pierce the veil of incorporation in our country to determine the citizenship of the members and then to give the corporation the benefit of Article 19.<sup>4</sup>

1. *State Trading Corp. of India v. Commercial Tax Officer*, 1963 S. C. 1811 (1821)

2. *State Trading Corporation of India v. Commercial Tax Officer*, 1963 SC 1811 (1820-21); *Municipal Committee v. State of Punjab*, (1969) 1 SCC 475; 1969 SC 1100; *State of Gujarat v. Sri Ambika Mills*, 1975 SCC 1300.

3. 1963 SC 1811.

4. *State Trading Corporation of India v. Commercial Tax Officer*, 1963 SC 1811.

# 8

## Rights of the People

### (i) Bill of Rights

#### S Y N O P S I S

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- 8·1. *Bill of Rights—In History.***

The one essential quality of Constitutionalism says, McIlwain, is as a legal limitation on Government. Tom Paine wrote that a constitution is "to liberty, what a grammar is to language." Of course, a written constitution is not necessary to the protection of civil liberties, as English experience so well



demonstrates. In accordance with British Jurisprudence, no member of the executive can interfere with the liberty of or property of a British Subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British Justice that Judges should not shrink from deciding such issues in the face of the Executive.<sup>1</sup> And the most elaborate safeguards in a written constitution will be meaningless unless the country to which they apply has a tradition which makes freedom a value of the highest order, and unless there are the resources, the opportunities, and the will to protect the principles of an open society from attack or frustration. Centuries of struggle in England to achieve political institutions which would aim toward equality before the law and equalization of political power, resulting in such documents as Magna Carta (1215), the Petition of Rights (1628), and the Bill of Rights (1689) were a living part of early American tradition. The writings of the seventeenth and eighteenth-century political philosophers, particularly Locke, with their notions about natural law and the origins of government in a compact freely entered into by its citizens, were an essential element in American Revolutionary thought. The Declaration of Independence put these ideas about liberty and equality into classic pharaseology.<sup>2</sup> As a matter of fact, the theory of the Constitutional Convention was that the traditional liberties did not need much in the way of specific constitutional protection. The basic concept of limited national Government was to be achieved by division of functions, separation of powers, checks and balances, calculated to frustrate any drive toward dictatorial power. Thus individual liberty did not need to be planned for. It would come automatically as the by-product of a system of economic opportunity, social mobility, and political responsibility. When the proposed Constitution went to the states for ratification, it quickly became apparent that the framers' view of civil liberties as needing no special protection in the new charter was not widely shared. In several of the important states ratification was secured only on the understanding that amendments protecting individual rights would be immediately added to the Constitution. In his first inaugural address, Washington urged Congress to give careful attention to the demand for these amendment. Twelve amendments were approved by the Senate and after concurrence by the House, they were sent to the states on September 25, 1789.<sup>3</sup> The ten amendments can be thought of as falling into four categories. The First, and justly most famous of the amendments, covers freedom of speech, press, assembly, and religion. The Second and Third, which are of little contemporary significance, deal with the right of the people to keep and bear arms, and the quartering of soldiers in private homes. The Fourth through the Eighth are concerned primarily with procedural protections in criminal trials, but other matters are also covered, such as the prohibition on taking of private property for public use without just compensation. Finally, the Ninth and Tenth Amendments are simply declaratory of the existing constitutional situation. The Ninth Amendment provides that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people. The Tenth concerns primarily state powers rather than individual rights. Only gradually did the conception grow that these ten amendments constituted a great Bill of Rights.<sup>4</sup> Difference of opinion arose as to whether the provisions of the Bill of Rights, and more particularly the first eight amendments, were applicable to the federal government alone, or whether they also affected the

1. *Eshugbayi Eleko v. Nigeria Government*, 1931 AC 662.

2. Pritchett: *American Constitution*, 285-86.

3. *Ibid.*, p. 286, 287.

4. *Ibid.*

states. The Supreme Court as early as 1833, in an unanimous opinion written by Chief Justice Marshall, ruled that these amendments were inapplicable to the states.<sup>1</sup>

Fourteenth Amendment was added in 1968, Section 1 of which reads. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to person within its jurisdiction the equal protection of the laws."

Assurance that rights are secure tends to diminish fear and jealousy of strong Government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak Government over strong Government.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>2</sup>

There are no Bill of Rights in England for the precise reason that Parliament is Sovereign. For a like reasons there was no such thing as Bill of Rights in the British Dominions.

Lord Hailsham (of St. Marylebone) speaking perhaps as a politician rather than a lawyer, is on record as urging the need for a Bill of Rights in order to restrain "socialist" legislation. (See the Times, May 16, 19 and 20, 1975). And, according to Zander (op. cit. p. 31), Sir Keith Joseph seems to believe that a Bill of Rights would prevent a Government from enacting legislation providing for compulsory purchase of housing.

Sir Leslie Scarman argues<sup>3</sup> that when times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual, but when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament.<sup>3</sup>

The Government of the India Act, 1919 had not recognised the Fundamental Rights. The Nehru Report, 1929 had made a demand for inclusion of Bill of Rights in the Constitutions to be framed in the future. The Simon Commission has said in its report:

"We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective."

1. *Barron v. Baltimore*, 7 Pet. 243.

2. Hamlyn's Lectures...*English Law...The New Dimensions*, p. 15.

3. 39 *Modern Law Review* 121...*Do we need a Bill of Rights...Lloyd of Hampstead*, the author has strongly opposed the idea of having a Bill of rights.

The Joint Committee on Indian Constitutional Reforms agreed with this observation. The result was there was no chapter on Fundamental Rights in the Government of India Act, 1935.

## 8.2. *Bill of Rights—Need not be a Bill of Human Rights.*

It is not necessary that a Bill of Rights, must be a Bill of Human Rights. Some Bill of Rights do prefer to be Bills of Human Rights, perhaps the most famous case is that of the French "Declaration of Rights of Man and citizen". The basic law in the Constitution of the Federal German Republic opens with a commitment to Human Rights. But several of the Basic Rights in the West German Constitution are expressly said to be not Human Rights but the Rights of the German People. While the Fundamental Rights in the Irish Constitution owe that inspiration from the Natural Law, traditions of Human Rights, they are expressly said to be the Rights of Irish Citizens.

The preamble to the United Nations "Universal Declaration of Human Rights" opens with the assertion that : "the recognition of the inherent dignity and equal inalienable rights, of all members of the human family is the foundation of freedom, justice, and peace in the world". There is a similar assertion in the beginning of the European "Convention for the Protection of Human Rights and Fundamental Freedoms". Nowhere in the Universal Declaration of Rights or in the Convention is there any mention about the idea of Human Rights.

"What exactly is it that" G. E. Moore said "we are saying when we say that certain rights are Human Rights? Upon what principle can those rights which are "Human" be differentiated from those which are not? In short how should we think of Human Rights and perhaps the most obvious way is in Cranston's words<sup>1</sup> as 'the rights of Human beings in all places and at all times'. The principle which distinguishes them is that they are the rights which people have not in virtue of nationality, sex, marital status, occupation, or any particular social or cultural characteristic, but simply as human beings. Can there be such rights"?<sup>2</sup>

## 8.3. *Background of our fundamental rights.*

The promotion and protection of universal respect for and observance of human rights and fundamental freedoms, was the concern of the Constituent Assembly. The roots of this concern may be traced to the humanist traditions of the Renaissance to the struggle for self determination, independence and equality that has taken place and is still proceeding in many parts of the world; to the philosophical concepts of such men as John Locke of England, Jean Jacques Rousseau of France, Thomas Jefferson of the United States of America, Karl Marx of Germany and V. I. Lenin of Russia; and to the impact of such events as the issuance of the Magna Carta by King John of England in 1215, the adoption of the Habeas Corpus Act by the British Parliament in 1679, the proclamation of the Declaration of Independence by representatives of the 13 North American Colonies in 1776, the adoption of the declaration of the rights of Man and of the Citizen by the National Assembly of France in 1798 and the publication of the Communist Manifesto in 1848.

Locke and Thomas Jefferson, considered individualism as a necessary prerequisite to the liberation of man from tyranny, monarchical and non-

1. M. Cranston...*Human Rights Today*, 1962.

2. Milne, A.J.M : '*Should we have a Bill of Rights*' 40 MLR 389.

representative government such important concepts as natural rights, the social contract, government by consent were all dependent on the concept of individualism.

Put simply, the concept of individualism established the matter of priority. Who is ultimately such as a man and his conscience, or the State? In Western democratic theory, emphasis was given to the priority of man. Man came first and was "endowed by his creator with certain inalienable rights". From this it followed that since man had natural rights at birth, the State was not the grantor of those rights. This meant that the state could neither give man his rights nor take them away. Since man and his rights existed prior to the establishment of Government, man and his rights could not be bargained away when Government was established.<sup>1</sup> The American Declaration eloquently presents :

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness, to secure these rights governments are instituted among men.....their just powers are derived from the consent of the governed; that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new Government."

Rousseau's political doctrine excludes any balance or equilibrium of powers, there is in the State only one supreme power to which all others are subordinated. The sovereign people can at any time change its rulers and its laws or modify the form of its governmental administration and the constitution of the State. In principle there is nothing it cannot do.<sup>2</sup> According to Rousseau's sovereignty was an inalienable right of the people and that no Government even as delegate of the people could properly claim any share whatever in the exercise of sovereign power Rousseau was vindicated historically by the success of the American Revolution and the opening words of the Constitution of the United States "We the people" were of the spirit of Rousseau.<sup>3</sup> In the French Revolution the French nation discovered its communal solidarity in the birth of individual freedom and popular Government. Since then the message of Rousseau has been carried to all corners of the world and its vitality and persistent timeliness continue to inspire free men every where. Ever since the French Revolution people came to feel that the maintenance of law and order was not enough in itself to justify political action. Individual happiness and social justice came also to be reckoned as values, values in terms of which it was right to make demands legal equality and, intellectual freedom.

The communist manifesto issued in 1848, had as its object the proclamation of the dissolution of bourgeois property. It said<sup>4</sup> : "The history of all hitherto existing society is the history of class struggles. Freeman and slave, patrician and plebeian, Lord and Serf, in a word oppressor and oppressed stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended either in a revolutionary reconstitution of society at large, or in the common ruin of the contending classes. Don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom,

1. Wasby...*Political Science*, p. 291.

2. *Encyclopedia of Social Science*, Vol. 13 p. 567.

3. Ebenstein : *Political Thinkers*, p. 441.

4. Laski : *Communist Manifesto*.

culture, law, etc. Your every ideas are but the outgrowth of the conditions of your bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class". The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only for the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communist revolution. The proletarians have nothing to lose but their chains. They have a world to win. Working men of all countries unite".

Lenin fully accepted the Marxian thesis that the transitional state between capitalism and communism, could be only the revolutionary dictatorship of the proletariat. He denied that capitalism and democracy were comparable, and affirmed that under capitalism democracy always remained a democracy for the minority, only for the rich.

Even with the American Revolution natural law ideas were beginning to wane. Nations soon arose which gave support to maintaining temporal governments usually at the expence of denying individual freedoms. The rights of man were being replaced by a nation about the rights of society. Over a hundred years ago the German poet Heine warned the French not to underestimate the power of ideas.: He spoke of Kant's *Critique of Pure Reason* as the sword with which European deism had been decapitated, and described the works of Rousseau as the blood stained weapon which, in the hands of Robespierre had destroyed the old regime, and prophesised that the romantic faith of Fichte and Schelling would one day be turned, with terrible effect by their fanatical German followers, against the liberal culture of the West. The facts have not wholly belied this prediction".<sup>1</sup> Hegals philosophy of the moral superiority of the state over the individual gave support to a doctrine which found fulfilment in Nazi Germany.

In the first half of the twentieth century, at the close of the First World War, international concern with human rights found expression in certain provisions of the covenant of the League of Nations. The inclusion among the purposes of the United Nations of the achievement of international cooperation, in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" as due above all to events which occurred immediately before, and during the Second World War. This and other human rights clause in the United Nation Charter, reflect the reaction of the international community to the horrors of that war and the beastiality of the regimes which unleashed it. The experience of that war resulted in the wide spread conviction that effective international protection of human rights was one of the essential conditions of international peace and progress.

#### 8.4. *Universal Declaration of Human Rights.*

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations on 10th December, 1948, "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for those rights and freedoms. The Declaration consists of a Preamble and 30 Articles, setting forth the human rights and fundamental freedoms to which all men and women every where in the world, were entitled without any discrimination.

1. Berlin...*Four Essays on Liberty*, p. 119.

Article 1 lays down the philosophy upon which the declaration is based, reads: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Article 2, which sets out the basic principle of equality and non-discrimination as regards the enjoyment of human rights and fundamental freedoms forbids "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 3, a cornerstone of the Declaration, proclaims the rights to life, liberty and security of person; rights which are essential to the enjoyment of all other rights. It introduces the series of articles (Articles 4 to 21) in which the human rights of every individual are elaborated further. Article 22, the second cornerstone of the Declaration, introduces Articles 23 to 27, in which economic, social and cultural rights, the rights to which every one is entitled as a member of society, are set out. The article characterises these rights as indispensable for human dignity and the free development of personality.<sup>1</sup>

### 8.5. Civil Rights of persons.

Civil rights of a person are generally divided into two classes, namely, the rights attached to the person (*jus personarum*) and the rights to things, i.e. property (*jus rerum*). Of the rights attached to the person, the first and foremost is the freedom of life, which means the right to live i.e. the right that one's life shall not be taken away except under authority of law. Next to the freedom of life comes the freedom of the person, which means that one's body shall not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed except under authority of law. The truth of the matter is that the right to live and the freedom of the person are the primary rights attached to the person. If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can, within certain limits, speak that he likes, assemble where he likes to form any associations or unions, move about freely as his own inclination may, direct, reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently rights attached to the person. It should be clearly borne in mind that these are not all the rights attached to the person. All rights attached to the person are usually called personal liberties and they are too numerous to be enumerated. Some of these auxiliary rights are so important and fundamental that they are regarded and valued as separate and independent rights apart from the freedom of the person.<sup>2</sup>

The people regarded certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the government of the country and other spheres. The people who vested the three limbs of Government with their power and authority, at the same time kept these rights of citizens and also some times of non-citizens, and made them inviolable except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed "Fundamental Rights," and the conditions under which these rights can be abridged are also indicated in that part. Briefly stated, the conditions are that they can be abridged only by a law in the public interest or to achieve a public purpose. These rights are not like the Directive Principles, which indicate the policy and general pattern for State action to enable India to emerge, after the

1. The United Nations and Human Rights, XXX Anniversary, 1978, p. 23.
2. A. K. Gopalan v. State of Madras, 1950 SC 27 (108).

struggle with poverty, disease, inequalities, and prejudices, as a Welfare State. These Directive Principles are not justiciable, but any breach of fundamental rights gives a cause of action to the aggrieved person.<sup>1</sup>

#### 8-6. *Some rights to remain independent of Social Control.*

Some portion of human existence must remain independent of the sphere of social control. To invade that preserve, however small, would be despotism. The most eloquent of all defenders of freedom and privacy, Benjamin Constant, who had not forgotten the Jacobin dictatorship, declared that at the very least the liberty of religion, opinion, expression, property, must be guaranteed against arbitrary invasion. Jefferson, Burke, Paine, Mill, compiled different catalogues of individual liberties, but the argument for keeping authority at bay is always substantially the same. We must preserve a minimum area of personal freedom if we are not to 'degrade or deny our nature. We cannot remain absolutely free, and must give up some of our liberty to preserve the rest. But total self-surrender is total self-defeating. What then must the minimum be? That which a man cannot give up without offending against the essence of his human nature. What is this essence? What are the standards which it entails? This has been, and perhaps always will be, a matter of infinite debate. But whatever the principle in terms of which the area of noninterference is to be drawn, whether it is that of natural law or natural rights, or of utility or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty *from*; absence of interference beyond the shifting, but always recognizable, frontier.<sup>2</sup>

"The only freedom which deserves the name is that of pursuing our own good in our own way", said the most celebrated of its champions. If this is so, is compulsion ever justified? Mill had no doubt that it was. Since justice demands that all individuals be entitled to a minimum of freedom, all other individuals were of necessity to be restrained, if need be by force, from depriving anyone of it.<sup>3</sup>

There seems to be scarcely any discussion of individual liberty as a conscious political ideal (as opposed to its actual existence) in the ancient world. The notion of individual rights was absent from the legal conceptions of the Romans and Greeks. This seems to hold equally of the Jewish, Chinese, Indian, and all other ancient civilizations that have since come to light. The domination of this ideal has been the exception rather than the rule even in the recent history of the West. Nor has liberty in this sense often formed a rallying cry for the great masses of mankind? The desire not to be impinged upon imposed to be left to oneself, has been a mark of high civilization both on the part of individuals and communities. Its decline would mark the death of a civilization of an entire moral outlook.<sup>4</sup>

#### 8-7. *Natural Rights.*

"It is appropriate to call" says Rawls by the name of natural rights, that justice protects. These claims depend solely on certain natural attributes

1. *Ujjam Bai v. State of U. P.*, 1962 SC 1621 (1962) : (1963) 1 SCR 778.

2. Isaiah Berlin...*Four Essays on Liberty*, p. 126-27.

3. *Ibid.*

4. *Ibid.*, p. 129.

the presence of which can be ascertained by natural reason pursuing common sense methods of enquiry. The existence of these attributes and the claims based upon them is established independently from social conventions and legal norms. The propriety of the term "natural" is that it suggests the contrast between the rights identified by the theory of justice and the rights defined by law and custom. But more than this, the concept of natural right includes the idea that these rights are assigned in the first instance to persons and that they are given a special weight. Claims easily overridden by other values are not natural rights. Justice as fairness has the characteristic marks of a natural rights theory, not only does it ground fundamental rights on natural attributes and distinguish their bases from social norms ; but it assigns right to persons by principles of equal justice, these principles having a special force against which other values cannot normally prevail."<sup>1</sup> It has seemed to many philosophers, and it appears to be supported by the conviction of common sense, that we distinguish as a matter of principle between the claims of liberty and the right on the one hand, and the desirability of increasing aggregate social welfare on the others ; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have an invariability, founded on justice or as some say on natural right which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by a greater good, shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. In a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.<sup>2</sup>

The doctrine of natural rights holds, a middle, ground between the Revolutionary and positivistic theories of the origin and extent of the rights of the individual. The true formula is that the individual has a right to all things that are essential to the reasonable development of his personality, consistently with the rights of others and the complete observance of the moral law. Where this rule is enforced the rights of all individuals, and of society as well, are amply and reasonably protected. On the other hand, if the individual's right are given a narrower interpretation, if on any plea of public welfare they are treated by the state as non-existent, there is an end to the dignity of personality and the sacredness of human life. Man becomes merely an instrument of the state aggrandizement, instead of the final and of its solicitude and the justification of its existence.

At the end of the last and the beginning of the present century, a new way of thinking grew up in respect of economic, social and cultural rights to which every one was entitled to as a member of society. Jurists began to think in terms of human wants or desires or expectations. They began to think of the end of law, not as a maximum satisfaction of wants. The first question was one of the wants to be recognised—of the interests to be recognised and secured. Having inventoried the wants or claims or interests which are asserting and for which legal security is sought, we were to value them, select those to be recognised, determine the limits within which they were to be given effect in view of other recognised interests, and ascertain how fair we might give them effect by law in view of the inherent limitations upon effective legal action. "For present purposes" said Lord Roscoe Pound, "I am content to see in legal history the record of a continually wider recognising and satisfying of

1. Rawl's : *A Theory of Justice*, p. 505.

2. *Ibid.*, p. 27-28

3. Roscoe Pound...*An Introduction to the Philosophy of Law*, p. 42.



human wants 'or claims or desires through social control ; a more embracing and more effective securing of social interests, in short, a continually more efficacious social Engineering."

### 8-8. *Fundamental Rights.*

Our founding fathers knew that people have a strong desire to realize the potentialities of their personalities, and to make productive use of the powers with which nature had endowed them and that it was right that an individual should develop his powers whatever they were. They were also conscious of the fact that "a high civilization benefitting the largest possible number of human being could only be built if the energies of men were not bound by oppressive shackles. A healthy system for the development of initiative, the fostering of mental resourcefulness and the release of creative talent have contributed greatly to cultural growth and progress the constitution has established a healthy system for the development.<sup>1</sup>

Naturally, therefore, in the Constitution as it was finally drafted, and adopted provision is to be found for a broad range of fundamental rights securing the rights of equality, liberty fair trial, religion, property and finally, also the right to seek and obtain judicial remedies. The High Courts as well as the Supreme Court are empowered to protect these rights and to declare any executive action or even legislation invalid when found to contravene the fundamental rights. What is more, unlike anywhere else in the world, every person, whether a citizen or not, was also given the right to approach the highest court in the country, namely, the Supreme Court of India even in the first instance if he could satisfy the court that his fundamental right had been abridged or threatened.

### 8-9. *Fundamental Rights under the Constitution.*

Part III of the Constitution deals with Fundamental Rights. Some fundamental rights are available to "any person", whereas other fundamental rights can be available only to "all citizens". "Equality before the law" or "equal protection of the laws" within the territory of India is available to any person (Art. 14). The protection against the enforcement of *ex post facto* laws or against double-jeopardy or against compulsion of self-incrimination is available to all persons (Art. 20) so is the protection of life and personal liberty under Art. 21 and protection against arrest and detention in certain cases, under Art. 22. Similarly, freedom of conscience and free profession, practice and propagation of religion is guaranteed to all persons. Under Art. 27, no person shall be compelled to pay any taxes for the promotion and maintenance of any particular religious denomination. All persons have been guaranteed the freedom to attend or not to attend religious instruction or religious worship in certain educational institutions (Art. 28). And, finally, no person shall be deprived of his property save by authority of law and no property shall be compulsorily acquired or requisitioned except in accordance with law, as contemplated by Art. 31. These in general terms without going into the details of the limitations and restrictions provided for by the Constitution, are the fundamental rights which are available to any person irrespective of whether he is a citizen of India or an alien or whether a natural or an artificial person. On the other

1. Roscoe Pound : *An Introduction to the Philosophy of Law*, p. 47.

2. *Sri Kallmata v. Union of India*, 1981 SC 1030 (1034).

hand, certain other fundamental rights have been guaranteed by the Constitution only to citizens and certain disabilities imposed upon the State with respect to citizens only. Article 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, etc., or from imposing any disability in respect of certain matters referred to in the Article. But Art. 16, equality of opportunity in matters of public employment has been guaranteed to all citizens, subject to reservations in favour of backward classes. There is an absolute prohibition against all citizens of India from accepting any title from any foreign State, under Art. 18 (2), and no person who is not a citizen of India shall accept any such title without the consent of the President, while he holds any office of profit or trust under the State (Art. 18 (3)).<sup>1</sup>

It will be noticed that of the seven rights protected by Clause (1) Art. 19, six of them, namely, (a), (b), (c), (d), (e) and (g) are what are said to be rights attached to the person (*jus personae*). The remaining item, namely, (f) is the right to property (*jus rerum*), no longer a fundamental right. If there were nothing else in Art. 19, these rights would have been absolute rights and the protection given to them would have completely debarred Parliament or any of the State Legislatures from making any law taking away or abridging any of those rights. But a perusal of Art. 19 makes it abundantly clear that none of the six rights enumerated in clause (1) is an absolute right for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in the several clauses (2) to (6) of that Article. Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights. The net result is that the unlimited legislative power given by Art. 246 read with the different legislative lists in Schedule 7 is cut down by the provisions of Art. 19 and all laws made by the State with respect to these rights must, order to be valid, observe these limitations, whether any law has in fact transgressed these limitations is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by clauses (2) to (6) whichever is applicable the Court will declare the same to be unconstitutional and, therefore, void under Art. 13. Here again there is scope for the application of the 'intellectual yardstick' of the Court. If, however, the Court finds on scrutiny, that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes law or not.<sup>2</sup>

Each one of these guaranteed rights under clauses (a) to (g) is subject to the limitations or restrictions indicated in clauses (2) to (6) of the Article. Of the rights guaranteed to all citizens, those under clauses (a) to (e) aforesaid are particularly opposite to natural person whereas the freedoms under clauses (f) and (g) aforesaid may be equally enjoyed by natural persons or by juristic persons, Article 29 (2) provides that no citizen shall be denied admission into any educational institution maintained by the state or State-aid on grounds only of religion, race, caste, language or any of them. This short resume of the fundamental rights dealt with by Part III of the Constitution and guaranteed either to 'any person' or to 'all citizens' leaves out of account other rights or prohibitions which concern groups, classes or associations of persons, with which we are not immediately concerned. But irrespective of whether a person is a citizen or non-citizen or whether he is natural person or a juristic person, the right to move the Supreme Court by appropriate proceedings for the enforcement of their respective rights has been guaranteed by Art. 32.

1. *State Trading Corp. of India v. Commercial Tax Officer*, 1963 SC 1811 (1816).

2. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (109).

It is clear on a consideration of the provisions of Part III of the Constitution that the makers of the Constitution deliberately and advisedly made a clear distinction between fundamental rights available to 'any person' and those guaranteed to 'all citizens'. In other words, all citizens are persons but all persons are not citizens, under the Constitution.

The enunciation of the guarantee of fundamental rights has taken different forms. In some cases it is an express declaration of a guaranteed right : Articles 29 (1), 30 (1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action-Legislative or executive-Articles 14, 15, 16, 20, 21, 22 (1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction: the form of positive declaration and simultaneously enunciate the restriction thereon Article 19 (1) and 19 (2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, *e. g.*, Article 31 (1) and 31 (2); in others, it takes the form of a general prohibition against the State as well as others : Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them; they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights.

It must be remembered that a free man has far more and wider rights than those stated in Art. 19 (1) of the Constitution. For example, a free man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundred and one things which are not included in Article 19. If freedom of person was the result of Art. 19, then a free man would only have the seven (now six) rights mentioned in that Article. But obviously the free man in India has far greater rights.<sup>1</sup>

"The conflict between man and the state is as old as human history. For this reason some compromise must be struck between private liberty and public authority. There is some need of protecting personal liberty against Governmental power and also some need of limiting personal liberty by Governmental power. The ideal situation is a matter of balancing one against the other, or adjusting conflicting interests."

In the United States' Constitution an attempt has been made to strike a proper balance between personal liberty and social control through express limitations written into the constitution and interpreted by the Supreme Court, by implied limitations created by the Supreme Court, and by the development of the Governmental powers of regulation, taxation, and eminent domain by the Supreme Court.<sup>2</sup> Whereas our Constitution has expressly sought to strike the balance between a written guarantee of individual rights and the collective interests of the community by making express provisions in that behalf in Part III of the Constitution.<sup>3</sup>

The idea of human rights involves rights against Government. It is important to emphasise this because postwar liberalism has purposefully

1. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (110), para 217 (Das, J.).

2. *Wills...Constitutional Law*, p. 477-78.

3. *A. K. Gopalan v. State of Madras*, 1950 SC 27.

expanded the idea of human rights to include a whole spectrum of "entitlements" identified as "rights" that are to be satisfied by Government.<sup>1</sup> Rights against Government are to be distinguished from democratic rights, the rights to participate in self-Government.<sup>2</sup>

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of the clause shall, to the extent of the contravention, be void.<sup>3</sup>

### 8-10. *Economic, Social and Cultural Rights.*

Both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights set out a number of human rights, the realization of which depends more upon the economic and social development of a country or territory than upon the adoption of legislative or administrative measures by the Government concerned.

Among these rights are the right to social security, the right to work under just and favourable conditions and to receive equal pay for equal work, the right to rest and leisure, the right to a standard of living adequate for health and well-being, the right to education, and the right to participate in the cultural life of the community.

In May 1968, the International Conference on Human Rights meeting at Teheran, Iran, proclaimed that the full realization of civil and political right without the enjoyment of economic, social and cultural rights was impossible; and the achievement of lasting progress in the implementation of human rights was dependent upon sound and effective national and international policies of economic and social development.

In 1969, the Commission on Human Rights appointed a Special Rapporteur and asked him to submit a detailed report on the realization, without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status, of those rights. The Special Rapporteurs also took into account the Declaration on Social Progress and Development, adopted by the General Assembly in December of that year.

The report completed in 1973, included the following recommendations for effective enjoyment of economic, social and cultural rights; elimination of sexism, racism, caste distinctions and any other kind of discrimination; more equitable distribution of wealth, income, opportunity and social services; reduction of the inequality between the rural and urban sectors; removal of the essentials-education, health, food, housing and clothing from the control of the market place; and establishment and strengthening of appropriate social institutions as agents of social change.

It is, therefore, not correct to say that fundamental rights alone are based on human rights while directive principles fell in some category other than human rights. The socio-economic rights embodied in the directive principles are as much a part of human rights as the fundamental rights. Hegde and Mukherjea, JJ., were right in saying in *Kesavananda Bharati's*<sup>4</sup> case at page 312 of the Report that:

1. Irving Krislot : *The Common sense of Human Rights*, Span. September 1981, p. 2.
2. *Ibid.*
3. Article 13 (2).
4. (1973) 4 SCC 312.

“The directive principles and the fundamental rights mainly proceed on the basis of human rights. Together they are intended to carry out the objectives set out in the preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice and ensuring dignity of the individual not only to a few privileged persons but to the entire people of the country including the have-nots and the handicapped, the lowliest and the lost.”<sup>1</sup>

### 8.11. *Rights Fundamental even though not mentioned in Article 19.*

Even if a right is not specifically named in Art. 19 (1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Art. 19 (1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.

### 8.12. *Machinery for enforcement of Fundamental Rights.*

In the Constitutions of other countries like the USSR and China, Fundamental Rights are mentioned and this had to be so because these countries are members of the United Nations and they have to adopt the provisions of the Universal Charter of the United Nations. Notwithstanding the mention of Fundamental Rights in these Constitution there is no machinery provided for the enforcement of these right by the individuals against the state.

Our Constitution describes certain rights as fundamental rights and places them in a separate Part—Part III. It provides a machinery for enforcing those rights. Article 32 prescribes a guaranteed remedy for the enforcement of those rights and makes the remedial right itself a fundamental right being included in Part III. Article 13 (1) declares that : “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void ; and Art. 13 (2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution and declares that any law made in contravention of that clause shall, to the extent of the contravention, be void.

It is true that any other Article of the Constitution may exclude the operation of the fundamental rights in respect of a specific matter for instance

1. (1973) 4 SCC 479 para 646.

2. *Maneka Gandhi v. Union of India*, 1978 SC 597 (640) Bhagwati, J.

3. *Ramesh Thappar v. State of Madras*, 1950 SCR 594 : 1950 SC 124

Arts. 31-A and 31-B, 31-C. It may also be that an Article embodying a fundamental right may exclude another by necessary implication, but before such a construction excluding the operation of one or other of the fundamental rights is accepted, every attempt should be made to harmonise the two Articles so as to make them co-exist, and only if it is not possible to do so, one can be made to yield to the other. Barring such exceptional circumstances, any law made would be void if it infringes any one of the fundamental rights.<sup>1</sup>

### 8.13. Fundamental Rights and Convicts.

It is no more open to debate that convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed.<sup>2</sup> However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards.<sup>3</sup> By the very fact of the incarceration prisoners are not in a position to enjoy the full panoply of fundamental rights because these very rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. In *D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh*<sup>4</sup> Chandrachud, J., observed :

“Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to “practice” a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law.”

Undoubtedly, lawful incarceration brings about necessary withdrawal or limitation of some of these fundamental rights, the retraction being justified by the considerations underlying the penal system.<sup>5</sup>

Consciously and deliberately we must focus our attention, while examining the challenge, to one fundamental fact that we are required to examine the validity of a pre-constitution statute in the context of the modern reformist theory of punishment, jail being treated as a correctional institution. But the necessary concomitants of the fact of incarceration, the security of the prison

1. *Kochuni v. State of Madras and Kerala*, 1961 SC 1080 (1089).

2. See *Procunier v. Martinex*, (1974) 40 L. ed. 2d 224 (248).

3. See *Charles Wolff v. Mc. Donnell*, (1974) 41 L. ed. 2d 935 (973).

4. (1975) 2 SCR 24 : AIR 1974 SC 2092.

5. See *Eye Pell v. Procunier*, (1974) 41 L. ed. 2d 495 (501).

and safety of the prisoner, are to be kept in the forefront. Not that the court would ever abdicate its constitutional responsibility to delineate and protect the fundamental rights but it must simultaneously but in balance the twin objects underlying punitive or preventive incarceration. The Court need not adopt a "hands off" attitude as has been occasionally done by Federal Courts in the United States in regard to the problem of prison administration. It is all the more so because a convict is in prison under the order and direction of the Court. The Court has, therefore, to strike a just balance between the dehumanising prison atmosphere and the preservation of internal order and discipline, the maintenance of institutional security against escape, and the rehabilitation of the prisoners.<sup>1</sup>

Prisons are closed societies populated by individuals who have demonstrated their inability or refusal to conform their conduct to the norms demanded by a civilized society. Of necessity, rules different from those imposed on society at large must prevail within prison walls. Lawful incarceration brings about the necessary withdrawal or limitation on many privileges and rights, a retraction justified by the considerations underlying the penal system. This fact of confinement and the needs of the penal institution impose limitations on constitutional rights including those derived from Article 19 which are implicit in incarceration. A prison inmate retains those fundamental rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally the inmates "status as a prisoner" and the operational realities of a prison dictate restrictions on the freedom of speech and associational rights among inmates.<sup>2</sup> Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff contain the ever present potential for violent confrontation and conflagration. Responsible prison official must be permitted to take reasonable steps to forestall such a threat.<sup>3</sup>

#### 8-14. *Waiver of Fundamental Rights.*

In *Behram Kharshid Pesikaka v. State of Bombay*,<sup>4</sup> there was a general discussion whether a fundamental right could be waived. In that case Venkatarama Aiyar, J. observed :

"The question is, what is the legal effect of a statute being declared unconstitutional. The answer to it depends on two considerations, firstly, does the constitutional prohibition which has been infringed affect the competence of the legislature to enact the law or does it merely operate as a check on the exercise of a power which is within its competence; and secondly, if it is merely a check, whether it is enacted for the benefit of individuals or whether it is imposed for the benefit of the general public on grounds of public policy. If the statute is beyond the competence of the Legislature, as for example, when a State enacts a law which is within the exclusive competence of the Union, it would be a nullity. That would also be the position when a limitation is imposed on the legislative power in the interests of the public, as, for instance, the provisions in Chap. 13 of the Constitution relating to inter-State

1. *Sunil Batra v. Delhi Administration*, 1978 SC 1727.

2. *Jones v. North Carolina Prisoner's Union*, 53 L. ed. 2d 629 (638).

3. *Ibid.*, p. 643.

4. (1955) 1 SCR 613 : AIR 1955 SC 123 (139).

trade and commerce. But when the law is within the competence of the Legislature and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity but is merely unenforceable. Such an unconstitutionality can be waived and in that case the law becomes enforceable. In America this principle is well settled.<sup>1</sup>

After referring to decisions of the American Supreme Court, the learned Judge concluded as follows : "The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals. The rights guaranteed under Art. 19 (1) ( f ) are enacted for the benefit of owners of properties and when a law is found to infringe that provision, it is open to any person whose rights have been infringed to waive it and when there is waiver there is no legal impediment to the enforcement of the law. It would be otherwise if the statute was a nullity : in which case it can neither be waived nor enforced. If then law is merely unenforceable and can take effect when waived it cannot be treated a *non est* and as effaced out of the statute book. It is scarcely necessary to add that the question of waiver is relevant to the present controversy not as bearing on any issue of fact arising for determination in this case but as showing the nature of the right declared under Art. 19 (1) ( f ) and the effect in law of a statute contravening it."

In *Behram Khursheed's* case, S. R. Das, J., preferred not to express any opinion but said: "In coming to the conclusion that I have, in a large measure found myself in agreement with the views of Venkatarama Aiyar, J., on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on legislative power or the effect of the declaration under Article 13 (1) being "relatively void". On those topics I prefer to express no opinion on this occasion."

It will, however, be noticed that the observations of the learned judges made in that case did not relate to the waiver of the breach of the fundamental right under Article 14.

The fundamental right, the breach whereof was complained of by the assessee was founded on Article 14 of the Constitution. The problem, therefore, before the Court was whether a breach of the fundamental right flowing from Article 14 could be waived.

The Court said: "It is absolutely clear, on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State." When case of *Behram Khursheed* came up before the Supreme

1. Cooley : *Constitutional Limitations*, Vol. I page 368 to 371.

2. 1955 SC 123 (139).

3. *Shepard v. Barron*, (1903) 194 US 553 (J); *Pierce v. Somerset Railway Co.*, (1898) 171 US 641 (K) and *Pierce Oil Corporation v. Phoenix Refining Co.*, (1921) 259 US 125 (L).

4. 1935 SCR (153).



Court on review Mahajan, C. J., with the concurrence of Mukherjea, Vivian Bose, and Ghulam Hassan, JJ. said:

"In our opinion, the doctrine of 'waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution. No inference in deciding the case should have been raised on the basis of such a theory. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the Articles, *inter alia*, Articles 15 (1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate," or get convicted by waiving the protection given under Articles 20 and 21."<sup>1</sup>

#### 8-15. *Concomitant Rights.*

The theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is not itself a guaranteed right included within the named fundamental right. This much is clear as a matter of plain construction, but apart from that, there is a decision of the Supreme Court which clearly and in so many terms supports this conclusion.<sup>2</sup>

When an enactment is found to infringe any of the fundamental rights guaranteed under Article 19 (1), it must be held to be invalid unless the those who support it can bring it under the protective provisions of the various clauses of Article 19 (2).<sup>3</sup>

1. AIR 1955 SC 139 (146).

2. *All India Bank Employees Association v. National Industrial Tribunal*, (1961) 3 SCR 269 : AIR 1962 SC 171.

3. *Viraj Lal Manilal v. State of M.P.*, (1969) 2 SCC 248 (255).

# 9

## The Rule of Law

### SYNOPSIS

- 9-1. Discretionary Power.
- 9-2. Rule of Law not possible to define.
- 9-3. Independent judiciary necessary.
- 9-4. Rule of Law under the Constitution.
- 9-5. Rule of Law...Laid down in a conference within the frame work of U.N.E.S.C.O.

#### **9-1. *Discretionary Power.***

Law has reached its first finest moments when it has freed man from the unlimited discretion of some ruler, some Civil or Military Official, some Bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded ; at times his privacy ; at times his liberty of movement ; at times his freedom of thought ; at times his life, Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other invention.<sup>1</sup>

#### **9-2. *Rule of Law not possible to define.***

The rule of law is not capable of precise definition. It is rather an attitude, an expression of certain liberal and democratic principles, in themselves vague when it is sought to analyze them, but clear enough in their results. There are many facets to free government and it is simpler to recognize it than to define it.<sup>2</sup>

It is far easier to describe the rule of law in negative, rather than positive, terms to state what it is not, rather than what it is. It is, in the first place, clear that law in the sense in which we are using it here is not synonymous with mere legality. It is not enough to say that the powers of the State must be derived from regularly enacted law, for that is the case in even the most despotic

1 . *United States v. Wunderlich*, 96 L ed. 113 (116), Douglas, J.

2. Jennings : *English Constitutional Law*, p. 47.

country. The powers of Louis XIV, or the Russian Tsar or Turkish Sultan, or the totalitarian rulers of our own day, all these are derived from duly decreed positive law. In truth, if the Stuart Kings had prevailed in their claims to legislate and tax without the consent of Parliament and to suspend and dispense with laws, their power would have been recognized as legal—but the rule of law would have disappeared from the English constitution.<sup>1</sup>

The distinction between law and legality is fundamental to the rule of law.

Though the Courts possess neither the sword of the executive nor the purse of the legislature, the judgments of the courts are normally adhered to without question by those who direct the strength and wealth of the society. Indeed, habitual acquiescence by a people in the finality of even possibly mistaken judgments is the underlying indispensable condition for implementation of the rule of law.<sup>2</sup>

One can go further and assert that the rule of law is utterly dependent upon the existence of a free society whose political institutions are endowed with authority only to promote such freedom. This was clearly pointed out by Justice Jackson in an address delivered on the 150th Anniversary of the United States Supreme Court: "However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government."

### 93. *Independent judiciary necessary.*

It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority, however, lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law. The power of judicial review is an integral part of our constitutional system and without it, teasing illusion and a promise of unreality. The court was of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, part of the basic structure of the Constitution.<sup>4</sup>

Implementation by an independent judiciary is vital to the practical effectiveness of the rule of law. "What is a right?" asks Justice Story in an important case, "that which may be enforced in a court of justice." The rights vouchsafed to the individual by the rule of law would be devoid of practical content if they, too, could not be enforced in a court. In the words of a penetrating French constitutional lawyer, "for a country to live under the rule of law, it is absolutely indispensable that it have a high court, with all

1. Schwartz : *The Powers of Government*, Vol., 1 p. 23.

2. *Ibid.*, p. 29.

3. *Ibid.*, p. 27.

4. (1980) 3 SCC 678.

possible safeguards of independence, impartiality, and competence, before whom can be brought an action to set aside any act challenged as contrary to law”.

#### 9.4. *Rule of Law under the Constitution.*

If we look at the various constitutional provisions including the Chapters on Fundamental Rights and Directive Principles of State Policy, it is clear that the rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness; its postulate is ‘intelligence without passion’ and ‘reason freed from desire’. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. That is why Aristotle preferred a government of laws rather than of men. ‘Law’ in the context of the rule of law, does not mean any law enacted by the legislative authority, howsoever, arbitrary or despotic it may be. Otherwise even under a dictatorship it would be possible to say that there is rule of law, because every law made by the dictator, howsoever, arbitrary and unreasonable has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set up is dictatorial, it is law that governs the relationship between men and men and between men and the State. But still it is not rule of law as understood in modern jurisprudence, because in jurisprudential terms, the law itself in such a case being an emanation from the absolute will of the dictator it is in effect and substance the rule of man and not of law which prevails in such a situation. What is a necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy seeks to ensure this element by making the framers of the law accountable to the people. Of course, in a country like the United Kingdom, where there is no written constitution imposing fetters on legislative power and providing for judicial review of legislation, it may be difficult to hold a law to be invalid on the ground that it is arbitrary and irrational and hence violative of an essential element of the rule of law and the only remedy if at all would be an appeal to the electorate at the time when a fresh mandate is sought at the election. But the situation is totally different in a country like India which has a written Constitution enacting Fundamental Rights and conferring power on the courts to enforce them not only against the executive but also against the legislature. The Fundamental Rights erect a protective armour for the individual against arbitrary or unreasonable executive or legislative action.

There are three Fundamental Rights in the Constitution which are of prime importance and which breathe vitality in the concept of the rule of law. They are Articles 14, 19 and 21 which in the words of Chandrachud, C. J. in *Minerva Mill*<sup>1</sup> case ‘constitute a golden triangle’.

The rule of law has much greater vitality under our Constitution than it has in other countries like the United Kingdom which has no constitutionally enacted Fundamental Rights. The rule of law has really three basic and fundamental assumptions one is that law making must be essentially in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinances effective for a short duration while the legislature is not in session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature, the other is that, even in the hands of a democratically elected legislature, there should not be unfettered legislative power, for, as Jefferson said: “Let no man be trusted with power but tie him down from making mischief by the chains of the Constitution”. And

1. (1981) 1 SCR 206 : 1980 SC 1789.

lastly there must be an independent judiciary to protect the citizen against executive and legislative power. Fortunately, whatever uncharitable and irresponsible critics might say when they find a decision of the court going against the view held by them, we can confidently assert that we have in our country all these three elements essential to the rule of law. It is plain and indisputable that under our Constitution law cannot be arbitrary or irrational and if it is, it would be clearly invalid, whether under Article 14 or Article 19 or Article 21 whichever be applicable.<sup>1</sup>

"I often wonder" said Judge Learned Hand "whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, these are false hopes, liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."<sup>2</sup>

**9-5. Rule of Law—Laid down in a conference within the frame work of U.N.E.S.C.O.**

In 1957 there was held in the University of Chicago a conference which devoted the whole of the five days of the meeting to a colloquium on the Rule of Law as understood in the West. The meeting was held within the general framework of U.N.E.S.C.O. A similar colloquium was arranged to be held in Eastern Europe in Warsaw in September, 1958.

The discussion may be summarised under two main titles: (1) The presentation of particular national ideas. For example, the methods of controlling executive power, as in the United Kingdom and France, or the control by the courts of the legislatures as in the federal communities of the United States and Western Germany. (2) The impact of the Welfare State upon the rule of law and the relationship of discretionary powers in administrative law to the rule of law.

The discussion was broadly based. The more important of the general statements have been summarised by the Secretary of the Colloquium as follows:

(1) The rule of law is an expression of an endeavour to give reality to something which is not readily expressible; this difficulty is due primarily to identification of the rule of law with the concept of the rights of man.....all countries of the West recognise that the rule of law has a positive content, though that content is different in different countries; it is real and must be secured principally, but not exclusively, by the ordinary courts.

(2) The rule of law is based upon the liberty of the individual and has as its object the harmonising of the opposing notions of individual liberty and public order. The notion of justice maintains a balance between these notions. Justice has a variable content and cannot be strictly defined, but at a given time and place there is an appropriate standard by which the balance between private interest and the common good can be maintained.

(3) There is an important difference between the concept of the rule of law as the supremacy of law over the Government and the concept of the rule

1. 1982 SC 1325.

2. Hand : *The Spirit of Liberty*, p. 189-190.

of law as the supremacy of law in society generally. The first concept is the only feature common to the West, connoting as it does the protection of the individual against arbitrary government.....different techniques can be adopted to achieve the same ends and the rule of law must not be conceived of as being linked to any particular technique. But it is fundamental that there must exist some technique for forcing the Government to submit to the law if such a technique does not exist, the Government itself becomes the means whereby the law is achieved. This is the antithesis of the rule of law.

(4) Although much emphasis is placed upon the supremacy of the legislature in some countries of the West, the rule of law does not depend only upon contemporary positive law.....it may be expressed in positive law but essentially it consists of values and not of institutions. It connotes a climate of legality and of legal order in which the nations of the West live and in which they wish to continue to live.<sup>1</sup>

1. Dicey : *Law of the Constitution*, p. 471-472.

## Rights of the People

### (ii) Right to Equality (Art. 14)

#### S Y N O P S I S

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- 10.39. Classification in regard to Land Acquisition case.
- 10.40. Classification in regard to Illegitimate Children.

### 10.1. *Rights to equality.*

Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

It is the first of the five Articles grouped together under the heading "*Right to Equality*". The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws." There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States.<sup>1</sup>

What is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, *pedantic* or *lexicographic* approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.<sup>2</sup>

1. *Bheshwar Nath v. Commissioner of Income Tax*, 1959 SC 149 (157-58).

2. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621; 1978 SC 597; *Nakare v. Union of India*, (1983) 1 SCC 305 (314).



The great purpose of the 14th Amendment of the American Constitution was to raise the coloured people the negroes from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of Civil rights with all other persons.<sup>1</sup>

### 10-2. Scope of Article 14—Equal Protection Clause.

The first part of Article 14, is a declaration of equality of the Civil Rights of all persons within the territory of India. It enshrines a basic principle of republicanism. The second part, is a corollary of the first. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.<sup>2</sup>

Equal protection of the laws is some thing more than an abstract right and is a command which the State must respect. No state may effectively abdicate its responsibility under the equal protection clause by ignoring them or by merely failing to discharge them, whatever the motive may be.<sup>3</sup>

Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The obligation thus imposed on the State no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this Article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed that, by virtue of Article 12, "the State" which is, by Article 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Article 13. Clause (1) which provides that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise Clause (2) of this Article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention be void. It will be observed that, so far as this Article is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other Articles, e.g., Article 19, Clauses (2) to (6). The right to equality before the law is thus completely and without any exception secured from all legislative discrimination. The right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also.<sup>4</sup>

1. *Ex Parte Common Wealth Virginia*, 25 L ed. 676.

2. *In re Special Courts Bill*, 1979 SC 478 (508).

3. *Burton v. Wilmington*, 6 L ed. 2d 45.

4. *Basheshar Nath v. Commissioner of Income Tax*, 1959 SC 149 (158).

This provision is not a guarantee of absolute equality for all citizen in all circumstances but is a guarantee of equality as human persons related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption of indeed a belief that some individual or individuals or classes of individuals are, by reason of their human attributes or their ethnic or racial, social or religious background, to be treated as the inferior or superior to other individuals in the community. This list does not pretend to be complete but is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves.

### 10.3. *Remedy directed against State only.*

The very language of Article 14 of the Constitution expressly directs that "the State", which by Article 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Article 14 protects us from both legislative and executive tyranny by way of discrimination.<sup>1</sup>

### 10.4. *When directed against individual action.*

The provisions of Article 14 are not confined to the action of the State through its legislatures, or through the executive but its provisions relate to and cover all the instrumentalities by which the state acts and so whenever, by virtue of public position under a Government deprives another of any right protected under Article 14 violates the Constitutional inhibition, and as he acts in the name of the State, and for the State, and is clothed with the states power, his act is that of the state.<sup>2</sup>

When private individuals or groups are endowed by the state with powers and functions governmental in nature, they become agencies or instrumentalities of the State and subject to its Constitutional limitations.<sup>3</sup>

The equal protection clause does not prohibit the individual invasion of individual rights, it does proscribe, however, state action of every kind that operates to deny any person, the equal protection of the law. This proscription applies to defacto as well as de jure because conduct that is formally private may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon State action.<sup>4</sup>

The Constitutional command for the state to afford "equal protection of the laws" sets a goal not attainable by the invention and application of a precise formula.<sup>5</sup> The equal protection clause is not shackled to the political theory of a particular era.<sup>6</sup>

### 10.5. *Essentials and limits of equal protection.*

Exact equality is no prerequisite of equal protection of laws. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.<sup>7</sup>

1. *Basheshar Nath v. Commr. of Income-tax*, 1959 SC 149 (158).
2. *Raymond v. Chicago Union*, 52 L. ed. 78 (87).
3. *Evans v. Newton*, 15 L. ed. 2d 373.
4. *Gilmore v. Montgomery*, 41 L. ed. 2d 304 (315).
5. *Kotch v. River Port Pilot Commr.*, 91 L. ed. 1093.
6. *Harper v. Virginia State Board*, 16 L. ed. 2d 169.
7. *Norvell v. State of Illinois*, 10 L. ed 2d. 456.

The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

A classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

"Equality before the Law" or "equal protection of the laws" within the meaning of Article 14 of the Constitution of India means absence of any arbitrary discrimination by the law or in their administration. No undue favour to one or hostile discrimination to another should be shown. A classification is reasonable when it is not an arbitrary selection but rests on differences pertinent to the subject in respect of which the classification is made. The classification permissible must be based on some real and substantial distinction, a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis.<sup>1</sup>

The content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, said Bhagwati, J., in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in *E. P. Royappa v. State of Tamil Nadu*,<sup>2</sup> that the Supreme Court laid bare a new dimension of Article 14 and pointed out that it is a guarantee against arbitrariness.<sup>3</sup> This Court speaking through Bhagwati, J. said:

"The basic principle which informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principles. It is a founding faith, of the Constitution. It is indeed the pillar on which rests securely the foundation of our, democratic republic. It must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute

1. *Om Prakash v. State of J. K.*, 1981 SC 1001 (1004); *State of West Bengal v. Anwar Ali*, 1952 SCR 284: 1952 SC 75.

2. (1974) 2 SCR 348: AIR 1974 SC 555 (583).

3. *Ajay Hasia v. Khalid Mujib*, 1981 SC 487 (498); *E. P. Royappa v. State of Tamil Nadu*, 1974 SC 555; *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621: AIR 1978 SC 597 (624): 1978 SC 597 (624).

monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

This was again reiterated by the Supreme Court in *Ramana v. International Airport Authority's* case.<sup>1</sup> It must, therefore, now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.<sup>2</sup>

#### 10.6. Doctrine of arbitrariness is not a new Doctrine.

It is difficult to accept the correctness of the above observations. It is also not possible to agree with the observation of Bhagwati, J., in *E.P. Rayappa v. State of Tamil Nadu*,<sup>3</sup> that it was for the first time that the Supreme Court laid bare a new dimension of Article 14 and that it was a guarantee against arbitrariness.

From the very beginning the Supreme Court has held that while Article 14 forbids class legislation, it does not forbid reasonable classification. In order to pass the test of permissible classification two conditions must be fulfilled namely: (i) the classification must be founded on an intelligent differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the subject sought by the statute in question,

If any statute is found not to comply with the two imperative requirements of Article 14 it will be struck down as void. No Act of the Legislature could be termed as arbitrary. If an order is made by any officer of the State contrary to the mandate of Article 14, that order will also be void and may be appropriately called arbitrary. Any order passed independent of a rule, or without adequate determining principle would be arbitrary. Here the adequate determining principle is the valid classification. Article 14 is not really a guarantee against arbitrariness. In the absence of norms regarding valid classification no order could be characterised as arbitrary in the context of Article 14. A classification would be arbitrary if it does not follow and is

1. (1979) 3 SCR 1014 (1042) : AIR 1979 SC 1628 (1642).

2. *Ajay Hasia v. Khalid Mujib*, 1981 SC 487 (498-499), para 16.

3. (1974) 2 SCR 348 : 1974 SC 555.

4. *Budhan Chowdhry v. State of Bihar*, 1955 SC 191.

contrary to the norms laid down by the Supreme Court in regard to classification.

The thrust of Article 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequal, a welfare state will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their conditions so that the social and economic inequality in the society may be bridged. This would necessitate a legislation applicable to a group of citizens, otherwise unequal and amelioration of whose lot is the object of State affirmative action. In the absence of doctrine of classification such legislation is likely to flounder on the bedrock of equality, enshrined in Article 14. The court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the state action must move as constitutionally laid down in Part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or state action designed to help weaker section of the society, or some segments of the society in need or succour.

#### 10-7. *Equal Protection and classification.*

"The fundamental guarantee is of equal protection of the laws and the doctrine of classification is only a subsidiary rule evolved by courts to give a practical content to that guarantee by accommodating it with the practical needs of the society and it should not be allowed to submerge and drown the precious guarantee of equality." The doctrine of classification should not be carried to a point where instead of being a useful servant, it becomes a dangerous master, for otherwise, as pointed out by Chandrachud, J. in *State of Jammu & Kashmir v. Triloki Nath Khosa*,<sup>1</sup> "The guarantees of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterised by different and distinct attainments." That process would inevitably end in substituting the doctrine of classification for the doctrine of equality; the fundamental right to equality before the law and equal protection of the laws may be replaced by the overworked methodology of classification.<sup>2</sup>

The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation.

It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely,

1. 1974 SC 1.

2. *Ibid.*, quoted in re *Special Courts Bill*, 1978, 1979 SC 478 (524) per Krishna Iyer, J.

geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure.<sup>1</sup>

### 10 8. Classification not forbidden by Art. 14.

The principle enunciated in *Budhan Chaudhary v. State of Bihar* (supra) has been consistently adopted and applied in subsequent cases. The decisions of the Supreme Court further establish.<sup>2</sup>

(a) that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

“The above principles will have to be constantly borne in mind by the Court” said Das C. J. “when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.”<sup>1</sup>

A close perusal of the decisions of the Supreme Court in which the above principles have been enunciated and applied by the Court will also show

1. *Budhan Chowdhry v. State of Bihar*, (1955) 1 SCR 1045 (1048) : 1955 SC 191 (193); *Motidas v. Sahi*, 1959 SC 942 (947).

2. *Ram Krishna Dalmia v. Tendolkar*, 1958 SC 538 (547-48); *R.K. Garg v. Union of India*, 1981 SC 2146; *Nagpur Improvement Trust v. Vithal Rao*, (1973) 1 SCC 500 (506); *Vajravelu v. Special Deputy Collector*, 1965 SC 1017 (1027).

3. *Ram Krishna Dalmia v. Tendolkar*, 1958 SC 538 (548).

that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution may be placed in one or other of the following five classes:<sup>1</sup>

(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by a statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law, as it did in *Chiranjitlal v. Union of India*<sup>2</sup> and in other cases.

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the Court will strike down the law as an instance of naked discrimination, as it did in *Ameerunissa Begum v. Mahboob Begum*<sup>3</sup> and *Ram Prasad Narain Sahu v. State of Bihar*.<sup>4</sup>

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar Ali Sarkar*<sup>5</sup> *Dwarka Prasad v. State of Uttar Pradesh*<sup>6</sup> and *Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs*.<sup>7</sup>

1. *Ram Krishna Dalmia v. Tendolkar*, 1958 SC 538.

2. AIR 1951 SC 41 (38) : 1950 SCR 869; *State of Bombay v. F. N. Balsara*, AIR 1951 SC 318 (V 38); 1951 SCR 682; *Kedar Nath Bajoria v. State of West Bengal*, 1954 SCR 30; AIR 1953 SC 404; *V.M. Syed Mohammad & Co. v. State of Andhra Pradesh*, 1954 SCR 1117; AIR 1954 SC 314 and *Budhan Chowdhry v. State of Bihar*, AIR 1955 SC 151 (V 42).

3. 1953 SCR 404 : AIR 1953 SC 91.

4. 1953 SCR 1129 : AIR 1953 SC 215.

5. AIR 1952 SC 75 : 1952 SCR 682.

6. 1954 SCR 803 : AIR 1954 SC 224.

7. (1955) 1 SCR 224: AIR 1954 SC 424.

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the Court will uphold the law as constitutional, as it did in *Kathi Raning v. The State of Saurashtra*.<sup>1</sup>

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by the Supreme Court, *e. g.*, in *Kathi Raning Ravat v. The State of Saurashtra*.<sup>2</sup> that in such a case the executive action but not the statute should be condemned as unconstitutional.<sup>3</sup>

The Supreme Court though undoubtedly at the cost of some repetition again stated the propositions which emerged from the judgments of the Supreme Court under Art. 14 of the Constitution.<sup>4</sup>

The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same.

By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree likely to produce some inequality; but if a law deals with the liberties of a number or well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a *nexus* between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary.

If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body

1. 1952 SCR 435 : 1952 SC 123.

2. *Ibid.*

3. *Ram Krishna Dalmia v. Tendolkar*, 1958 SC 538 (549).

4. *In re Special Courts Bill*, 1979 SC 478 (509).



of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to objective of the legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.<sup>1</sup>

#### 10-9. *Economic action and classification.*

Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc. The prominence given to the equal protection clause in many modern opinions and decisions in America all show that the Court feels less constrained to give judicial deference to legislative judgment in the field of human and civil rights than in that of economic regulation.<sup>2</sup>

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think.<sup>3</sup>

1. *In re Special Courts Bill*, 1978, 1979 SC 478 (510).

2. *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300 (1314), *Developments-Equal Protection*, 82 Harv Law Review 1085 (1127).

3. *Ibid.*; *Tigner v. Texas*, (1939) 310 US 141.

Once an objective is decided to be within legislative competence, however, the working out of classifications has been only infrequently impeded by judicial negatives. The Court's attitude cannot be that the state either has to regulate all businesses, or even all related businesses, and in the same way, or not at all. An effort to strike at a particular economic evil could not be hindered by the necessity of carrying in its wake a train of vexatious, trouble some and expensive regulations covering the whole range of connected or similar enterprises. And that it is making a vigorous use of the equal protection clause to strike down legislative action in the area of fundamental human rights.<sup>1</sup>

"Equal protection clause rests upon two largely subjective judgments ; one as to the relative invidiousness of particular differentiation and the other as to the relative importance of the subject with respect to which equality is sought".<sup>2</sup>

It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.<sup>3</sup> Nowhere has this admonition been more felicitously expressed than in *Morey v. Doul*,<sup>4</sup> where Frankfurter, J. said :

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adaption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and uninterpreted experience." Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in *Secy. of Agriculture v. Central Roig. Refining Co.*,<sup>5</sup> be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a

1. See Cox, "The Supreme Court Foreward", 1965 Term, 80 Harv. Law Review 91-95.

2. 82 Harv Law Review 1085 (1127).

3. *R. K. Garg v. Union of India*, 1981 SC 2138 (2147).

4. (1957) 354 US 457 ; *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300 (1314).

5. (1950) 94 L. ed. 381; *Dandridge v. Williams*, 25 L. ed. 491.

ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions, and abuse of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever, great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.<sup>1</sup>

#### 10-10. *Latitude to legislature.*

A large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, the courts have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judiciary cannot rush in where even the legislature warily treads."<sup>2</sup>

The Court in *Mohammad Shujat Ali v. Union of India*,<sup>3</sup> has explained the constitutional fact of classification :

"This doctrine recognises that the legislature may classify for the purpose of legislation but requires that the classification must be reasonable. It should ensure that persons or things similarly situated are all similarly treated. The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

But the question is what does this ambiguous and crucial phrase similarly situated means ? Where are we to look for the test of similarity of situation which determines the reasonableness of a classification ? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons or things similarly situated with respect of the purpose of the law."

#### 10-11. *Limits of classification.*

Legislative classification does not violate the Equal Protection Clause merely because the classification it makes are imperfect.<sup>4</sup> Even if the classification involved is to some extent both under inclusive and over inclusive; and hence the line drawn by the Legislature, imperfect, it is nevertheless the rule

1. *R. K. Garg v. Union of India*, 1981 SC 2138 (2147).

2. *Murthy Match Works v. Assistant Collector*, 1974 SC 497 (503-504).

3. 1975 SCR 441 (477); AIR 1974 SC 1631 (1653).

4. *Dandridge v. Williams*, 25 L. ed. 2d 491.

that in a case like this "perfection" is by no means required. When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well be a little more to one side or the other. But when it is seen that a line or point there must be, and there is no mathematical or logical way fixing it precisely, the decision of the legislature must be accepted unless the Courts could say that it was very wide of any reasonable mark.<sup>1</sup>

The equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programmes, so long as the line drawn, by the state is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point.<sup>2</sup>

The Courts have recognised a distinction between discrimination *i. e.* a classification drawn with an "evil eye and an unequal hand" or motivated by a failing "against a specific group of residents.

#### 10-12. *Over inclusive and under inclusive classification.*

A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as underinclusive when a State benefits persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.<sup>3</sup>

The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislature, recognizing these factors, may wish to proceed cautiously and Court must allow them to do so.<sup>4</sup>

A statute is not invalid because it might have gone further than it did, since a legislature need not strike at all evils at the same time and may address itself to the phase of the problem which seemed most acute to the legislative mind.<sup>5</sup> Without violating the equal protection clause the legislatures may imple-

1. *Louisville Gas Co. v. Coleman*, 72 L ed. 770 (775) ; *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300 (1313).

2. *Geduldig v. Aiello*, 41 L ed. 2d 256 (264).

3. *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300 (1313).

4. 37 *California Law Review*, p. 341 cited in *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300.

5. *Buckley v. Valeo*, 46 L ed. 2d 659.

ment their programme step by step at a time and may adopt legislation that only partially ameliorates a perceived evil and defer complete elimination of the evil to future legislation.<sup>1</sup>

**10-13. Classification—Similarity not identity.**

Similarity, not identity of treatment is enough. If there is equality and uniformity within each group; the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment.<sup>2</sup>

In *Hathi Singh Manufacturing Co. v. Union of India*<sup>3</sup> the constitutional validity of Section 25 FFF of the Industrial Disputes Act, 1947 was assailed. That section made a distinction between employers who had closed their undertaking on or before November 28, 1956 and those who closed their undertakings after that date. The Supreme Court rejected the contention. When Parliament enacts a law imposing a liability as flowing from certain transactions prospectively, it evidently makes a distinction between those transactions which are covered by the Act and those which are not covered by the Act because they were completed before the date on which the Act was enacted. This differentiation does not amount to discrimination which is liable to be struck down under Art. 14. The power of the Legislature to impose civil liability in respect of transactions completed even before the date on which the Art. 14 is enacted does not appear to be restricted.

The State is undoubtedly enjoined by Art. 14 of the Constitution not to deny to any person equal protection of the laws within the territory, but a proper classification bearing a reasonable and just relation to the object sought to be achieved by the statute does not on that account become impermissible. All persons who are similarly circumstanced as regards a subject-matter are entitled to equal protection of the laws, but it is not predicated thereby that every law must have universal application irrespective of dissimilarity of objects or transactions to which it applies, or of the nature of attainments of the persons to whom it relates. The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute.<sup>4</sup>

Before a person can claim to be discriminated against another he must show that all the other persons are similarly situate or equally circumstanced. The pleading of the appellant in *Pathumma v. State of Kerala*<sup>5</sup> did not at all contain any facts to show how the two were similarly situate.

The legislature cannot be required to impose upon administrative agencies tasks which cannot be carried out or which must be carried out on a large scale at a single stroke. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it

1. *New Orleans v. Duke*, 49 L ed. 2d 511 (517).

2. *Anand Mills v. State of Gujarat*, 1975 SC 1234 (1244).

3. (1960) 3 SCR 528: 1960 SC 923.

4. *State of Madhya Pradesh v. Bhopal Sugar Industries*, 1974 SC 1179 (1181).

5. 1978 SC 771 (780).

might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms.”<sup>1</sup>

Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven affects upon particular groups within a class are ordinarily of no constitutional concern.

The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. When some other independent right is not at stake, it is presumed that “even improvident decisions will eventually be rectified by the democratic process.”<sup>2</sup>

Article 14 does not require that every regulatory statute applies to all in the same business. Where size is an index to the evil at which the law is directed, discriminations between the large and small are permissible, and it is also permissible for reform to take one step at a time addressing itself to the phase of the problem which seem most acute to the legislative mind.<sup>3</sup>

A legislative authority acting within its field is not bound to extend its regulation to all cases which it might possibly reach. The legislature is free to recognize degrees of harm and it may confine the restrictions to those classes of cases where the need seemed to be clearest.<sup>4</sup>

It is also clear that in making the classification the legislature cannot be expected to provide an abstract symmetry but the classes have to be set apart according to the necessities and exigencies of the society as dictated by experience and surrounding circumstances. All that is necessary is that the classification should not be arbitrary, artificial or illusory.<sup>5</sup>

#### 10-14. Equal Protection Clause

The equal protection clause does not mean that a State may not draw lines that treat one class of individuals or entities different from others; the test is whether the difference in treatment is an invidious discrimination.<sup>6</sup>

Discrimination violative of Art. 14 can only take effect if there is discrimination between equals and not where unequals are being differently treated.<sup>7</sup>

In the case of *Chiranjit Lal Choudhuri v. Union of India*,<sup>8</sup> the Supreme Court observed as follows :

1. *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300 (1313) ; *West Coast Hotel Co. v. Parrish*, (1936) 300 US 379 (400).

2. *State of Gujarat v. Sri Ambica Mills*, 1974 SC 1300 (1313).

3. *Ibid.*, p. 1314.

4. *Ibid.*; *Mutual Loan Co. v. Martell*, (1911) 56 L ed. 175 (180).

5. *Pathumma v. State of Kerala*, 1978 SC 771 (786) para 42.

6. *Lehnhausen v. Lake Shore Auto Parts*, 35 L ed. 2d 351.

7. *Pathumma v. State of Kerala*, 1978 SC 786. (1974) 1 SCR 771 (783) : AIR 1974 SC 1 (11).

8. 1950 SCR 869 (911) : AIR 1951 SC 41 (57).

“It must be admitted that the guarantee against the denial of equal protection of the laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. As has been said by the Supreme Court of America, “equal protection of laws is a pledge of the protecting of equal laws.” (See *Yick v. Hopkings*)<sup>1</sup> and this means ‘subjection to equal laws applying alike to all in the same situation’ (See *Southern Railway Co. v. Greene*)<sup>2</sup> In other words, there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same.” “The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection ; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classification is made, and classification made without any substantial basis should be regarded as invalid.”<sup>3</sup>

To the same effect is another decision of the Supreme Court in the case of the *State of West Bengal v. Anwar Ali Sarkar*<sup>4</sup> where this Court observed as follows :—

“It can be taken to be well settled that the principle underlying the guarantee in Art. 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same.”<sup>5</sup>

#### 10-15. *Classification based on Race and Gender.*

The Equal Protection Clause is not framed in terms of “stigma.” Certainly the word has not clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.<sup>6</sup>

1. (1885) 118 US 356 (369).

2. (1909) 216 US 400 (412).

3. quoted in *Pathumma v. State of Kerala*, 1978 SC 771 (787).

4. AIR 1952 SC 75.

5. quoted in *Pathumma v. State of Kerala*, 1978 SC 771 (787).

6. *University of California Regents v. Bakke*, 57 L. ed. 2d. 750 (774) FN 34.

Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. The Racial and ethnic classifications, are subject to stringent examination without regard to any additional characteristics. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>1</sup>

"Illegal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. Courts must subject them to the most rigid scrutiny."<sup>2</sup>

"The guarantees of equal protection", said the Court in *Vick Wo*<sup>3</sup> "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."<sup>4</sup>

Classifications based upon gender, not unlike those based upon race have traditionally been the touchstone for pervasive and often subtle discrimination. Such classifications must bear a close and substantial relationship to important Governmental objectives.

When a statute gender-neutral on its face is challenged on the ground that it effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based.

#### 10-16. *Classification based on language.*

Article 14 protects all Indians *qua* Indians, within the territory of India. Article 350 sanctions representation to any authority, including a Court, for redress of grievances in any language used in the Union or in the State. Equality before the law implies that even a vakalat or affirmation made in any state language according to the law in that state must be accepted every where in the territory of India save this is to be where valid legislation to the contrary exists.<sup>5</sup>

#### 10-17. *Classification and Morality.*

The validity of a classification has to be judged with reference to the object of the legislation and if that is done, there can be no doubt that the classification made by the Act is rational and intelligible.<sup>6</sup>

In *R. K. Garg v. Union of India*,<sup>7</sup> it was contended that the Act offended against morality by according to dishonest assesseees who had evaded payment of tax, immunities and exemptions which were denied to honest tax payers. The Supreme Court by majority judgment repelled the contention. Bhagwati, J. said, 'It is necessary to remember that we are concerned with the constitutional validity of the Act and not with its morality. Of course, when we say this we do not wish to suggest that morality can in no case have relevance to the

1. *Hirabayashi*, 320 US at 100 : 87 L ed. 1774.

2. *Korematsu*, 323 US, at 216: 89 L ed. 194.

3. 438 US 293.

4. 118 US, at 369: 30 L ed. 220.

5. *Mott Ram v. State of M. P.*, 1978 SC 1594 (1601).

6. *R. K. Garg v. Union of India*, 1981 SC 2138 (2155-6).

7. *Ibid.*



constitutional validity of a legislation. There may be cases where the provisions of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational and hence violative of Article 14. But the test in every such case would be not whether the provisions of the statute offend against morality but whether they are arbitrary and irrational having regard to all the facts and circumstances of the case. Immorality by itself is not a ground of constitutional challenge and it obviously cannot be, because morality is essentially a subjective value, except in so far as it may be reflected in any provision of the Constitution or may have crystallised into some well-accepted norm of special behaviour.”<sup>1</sup>

#### 10-18. *Guarantee of equal protection as against State.*

The guarantee of equal protection of laws is addressed not only to the state but also to every person whether natural or juridical who is the repository of state power.<sup>2</sup>

The equal protection clause prohibits discriminatory action by the State, but erects no shield against private conduct however discriminatory or wrongful it may be, but while that principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand or amounts to “state action” on the other hand, frequently admits of no easy answer.<sup>3</sup> This proscription on state action applies *de facto* as well as *de jure* because conduct that is formally private may become so entwined with governmental policies, so impregnated with a governmental character as to become subject to the constitutional limitations placed upon State action.<sup>4</sup>

Discrimination by an otherwise private entity is not violative of the equal protection clause merely because the private entity receives some sort of benefit or service from the state or because it is subject in some degree to State Regulation.<sup>5</sup> Here the word state means state as defined in Article 12.

Although the prohibition of Article 14 has reference exclusively to action by the State as distinguished from action by private individuals, the rights thereby protected may be invaded by the acts of a state officer under color of state authority, even though he has not only exceeded his authority but also disregarded special commands of the state law.<sup>6</sup>

#### 10-19. *Discrimination by decision of Courts.*

Article 14 does not assure uniformity of judicial decisions or immunity from judicial error.<sup>7</sup>

The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law.<sup>8</sup>

1. *R. K. Garg v. Union of India*, 1981 SC 2138 (2155-56).
2. *Home Telephone & Telegraph Co. v. Los Angeles*, 57 L ed. 510.
3. *Moose Lodge v. Irvis*, 32 L ed. 2d 627.
4. *Gilmore v. Montgomery*, 41 L ed. 2d 304.
5. *Ibid*, 41 L ed. 2d 304.
6. *Iowa-Des Moines National Bank v. Bennett*, 76 L ed. 265.
7. *Snowden v. Hughes*, (1943) 321 US 1 : 88 L ed. 497.
8. *Budhan Chowdhry v. State of Bihar*, 1955 SC 191 (195).

The judiciary does not come within the ambit of the definition of the term State in Article 12.

**10-20. Article 14—Executive officer.**

The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of the equal protection of the law guaranteed by Article 14 unless there is shown to be present in it an element of intentional or purposeful discrimination.<sup>1</sup>

In *State of Jammu and Kashmir v. Ghulam Rasool*<sup>2</sup> the respondent urged that he was entitled to have the procedure prescribed by the Kashmir Civil Service Rules followed before the order demoting him could be made and as that procedure was not followed he had been denied the equal protection of the laws. But the Supreme Court said that even if the rules were a law and the respondent had not been given the benefit of them, all that could be said to have happened was that the Government had acted in breach of the law. But that did not amount to a violation of the right to the equal protection of the laws, otherwise every breach of law by a Government would amount to a denial of the equal protection of the laws. It is not the respondent's case that other servants of the Government, had been given the benefit of the Rules, and such benefit had been designedly denied only to him.<sup>3</sup>

In *Narain Dass v. Improvement Trust*,<sup>4</sup> it was contended that while administering Section 56 of the Punjab Town Improvement Act there had been hostile discrimination against the appellant because lands under orchards belonging to persons similarly placed had been exempted whereas the appellants had been refused exemption. Rejecting the contention, the Supreme Court said that :—

“If the appellant had failed to bring their case within Section 56 of the Act, then merely because some other party had erroneously succeeded in getting his lands exempted ostensibly under that Section that by itself would not clothe the appellant with a right to secure exemption for their lands. The rule of equality before the law or of the equal protection of the laws under Article 14 could not be invoked in such a case.”<sup>5</sup>

Every wrong interpretation of a rule of law does not amount to a hostile discrimination. What is of the essence is hostile discrimination—an intentional unequal treatment of persons similarly placed. It is not that any and every contravention of a Rule brings the case within Article 14.<sup>6</sup>

**10-21. Intention of officer applying law relevant.**

Although a law is fair on its face and impartial in appearance, yet if it is applied and administered with an evil eye and unequal hand, so as to make unjust and illegal discrimination, it is within Article 14.<sup>7</sup>

1. *Snowden v. Hughes*, 88 L ed. 497.

2. 1961 SC 1301 (1302).

3. *Ibid.*

4. 1972 SC 865.

5. *Sashi Bhushan Prasad Singh v. State*, 1982 AP 55 (59).

6. *Siddappa, H. J. v. State of Mysore*, 1967 Mys. 67 (71).

7. *Yick Wo v. Peter*, 1885 118 US 356 23 L ed. 550; *Budhan Chowdhary v. State of Bihar*, 1955 SC 191 (194).

**10-22. Selecting date—Classification.**

The choice of a date as a basis for classification can not always be dubbed as arbitrary even if no particular reason is forth coming, for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely the decision of the legislature or its delegate must be accepted unless it could be said that it was very wide of the reasonable mark. In *Union of India v. Parmeswaran Match Works*<sup>1</sup> the Court held that the object of granting the concessional rate of duty was to protect the smaller units in the industry from the competition by the larger ones and that object would have been frustrated, if by adopting the device of fragmentation, the larger units could become the alternate beneficiaries of bounty. This was the weighty consideration which prompted the court to uphold the date. In *Gouri, D.C. v. State of Kerala*<sup>2</sup> the Bill was published in June 1973 in which it was made clear that the Act would be brought into force from April 1, 1970.

After recalling the various stages through which the Bill passed before being enacted as Act, the Supreme Court held that the choice of date April 1, 1973 was not wide of the reasonable mark.

In *Nim, D. R. v. Union of India*<sup>3</sup> the Indian Police Service (Regulation of Seniority) Rules, 1954 required the determination of the year of allotment of the person concerned for the determination of his seniority. In doing so, the Government of India directed that officers promoted to the Indian Police Service should be allowed the benefit of their continuous officiation with effect only from May 19, 1951. The order was challenged on the ground that there was no rationale behind selecting this date. The Supreme Court held that the Central Government could not pick out a date from a hat. The date, May 19, 1951, was an artificial and arbitrary date having nothing to do with the application of the first and the second provisos to Rule 3.

Similarly in *Jaita Singh v. State of Rajasthan*<sup>4</sup> the Supreme Court struck down as discriminatory the decision of pre 1955 and post 1955 tenants for the purpose of allotment of land by the tenants for the purpose of allotment of land made by the Rules under the Rajasthan Colonization Act, 1954, observing that the various provisions indicated that the pre 1955 and post 1955 tenants stood on the same footing.

In *Nakara, D.S. v. Union of India*,<sup>5</sup> the question before the Supreme Court was eligibility criteria for being eligible for liberalised pension scheme. No rationale was discernible. The Court said : when a certain date or eligibility criteria is selected with reference to legislative or executive measure which has the pernicious tendency of dividing an otherwise homogeneous class and the choice of beneficiaries of legislative or executive action becomes selective, the division or classification made by choice of date or eligibility criteria must have some relation to the objects sought to be achieved. If the choice of the date, or classification is wholly unrelated to the objects sought to be achieved, it cannot be upheld on the specious plea that there was the choice of the legislature.<sup>6</sup> The rational principle co-related to the object sought to be achieved.

1. (1975) 2 SCR 573: 1974 SC 2349.
2. (1980) 1 SCR 504: 1980 SC 271.
3. (1967) 2 SCR 325 : 1967 SC 1301.
4. (1975) Supp SCR 428 : 1975 SC 1436 ;
5. (1983) 1 SCC 305.
6. (1983) 1 SCC 305 (339).

Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and rational principle correlated to the object sought to be achieved. The State would, therefore, have to affirmatively satisfy the Court that the twin tests have been satisfied. In *Ramana Dayaram Shetty v. International Airport Authority*<sup>1</sup>, the Supreme Court observed that a discriminatory action against the Government was liable to be struck down, unless it could be shown by the Government that the departure was not arbitrary, but was based on valid principle which in itself was not irrational, unreasonable, or discriminatory.<sup>2</sup>

### 10.23. Classification—State and Municipality.

Acts in so far as they provide for special procedures applying to the State and the Municipal Corporation have been held to be valid. The decisions in *Baburao Shantaram v. Bombay Housing Board*,<sup>3</sup> upholding the exemption of premises belonging to the Government or a local authority from the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947; *Collector of Malabar v. Erimma Ebrahim Hajee*,<sup>4</sup> upholding the provision for special modes of recovery for incometax; *Asgarali Nazarali v. State of Bombay*<sup>5</sup> upholding the validity of Criminal Law Amendment Act, 1952, providing for the trial of all offences punishable under Sections 161, 165 or 165-A of the Indian Penal Code, or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 exclusively by Special Judges; *Manna Lal v. Collector of Jhalwarla*,<sup>6</sup> upholding the provision of the Rajasthan Public Demands Recovery Act, 1952 for recovering moneys due to a State Bank; *Nav Rattanmul v. State of Rajasthan*,<sup>7</sup> upholding a special period of limitation for the Government; *Lachhman Das v. State of Punjab*,<sup>8</sup> upholding the provisions of an Act setting up separate authorities for determination of disputes and prescribing a special procedure to be followed by them for the recovery of the dues of a State Bank; and *Builders Supply Corpn. v. Union of India*,<sup>9</sup> upholding the doctrine of priority of Crown Debts, are all instances where special provisions applicable to the State were upheld. It cannot now be contended that special provision of law applying to Government and public bodies is not based upon doctrine of reasonable classification or that it offends Article 14.

Now in all these decisions the law providing for special treatment to Government or other public bodies was held not to be discriminatory, but from that it does not follow that every law which gives differential treatment to Government or other public bodies is necessarily immune from challenge on the ground of discrimination. There is no talisman or charm protecting a law from the vice of unconstitutional discrimination, when the discrimination is in favour of the Government or other public bodies. The law is now well settled that the Legislature has power of making special laws to attain

1. (1979) 3 SCR 1014 (1034) : 1979 SC 1628: (1979) 3 SCC 489 (506).

2. *Nakara, D. S. v. Union of India*, (1983) 1 SCC 305 (318)

3. 1954 SCR 572 : AIR 1954 SC 153.

4. 1957 SCR 970 : AIR 1957 SC 688.

5. 1957 SCR 678 : AIR 1957 SC 503.

6. (1961) 2 SCR 962 : AIR 1961 SC 828.

7. (1962) 2 SCR 324 : AIR 1961 SC 1704.

8. (1963) 2 SCR 353 : AIR 1963 SC 222.

9. (1965) 2 SCR 289 : AIR 1965 SC 1061.

particular ends, and for that purpose it may select or classify persons and things upon which such laws are to operate. But the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause contained in Article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based on some real distinction, bearing a just and reasonable relation to the object of the Legislation, and is not a mere arbitrary selection. The classification to be valid and permissible must satisfy a double test. It must be founded on an intelligible differentia, which distinguishes those who are grouped together from others, and that differentia must have a rational relation to the object sought to be achieved by the statute. It was on an application of this double test that in the above mentioned decisions the law making special provision for Government or other public bodies was held to be constitutionally valid.<sup>1</sup> The application of the same double test, however, resulted in the invalidation of the exemption of debts due to the Central Government or the Government of any State or a local authority from the operation of the Rajasthan Jagirdar's Debt Reduction Act which provided for scaling down of debts of Jagirdars whose Jagir lands had been resumed by the Government.<sup>2</sup> It will thus be seen that where a statute according special treatment to Government or other public bodies, is challenged on the ground of discrimination, the validity of the statute has to be judged by applying this double test, and it is this double test which the Courts must, proceed to apply in determining the validity of the impugned provision contained in the two statutes.

#### 10-24. *Classification—Educational qualification.*

There are three decisions of the Supreme Court where educational qualifications have been recognised as forming a valid basis for classification. In *State of Mysore v. Narasing Rao*,<sup>3</sup> the Court held that higher educational qualification such as success in S. S. L. C. examination were relevant considerations for fixation of higher pay scale for tracers who had passed the S. S. L. C. examination and the classification of two grades of tracers in Mysore State one for matriculate tracers with higher pay scale and the other for non-matriculate tracers with lower pay scale, could not be said to be violative Article 14 or 16. So also in *Union of India v. Dr. (Mrs) S. B. Kohli*,<sup>4</sup> a Central Health Service Rule requiring that a Professor in Orthopaedics must have a post-graduate degree in particular speciality was upheld on the ground that the classification made on the basis of such a requirement was not "without reference to the objectives sought to be achieved and there could be no question of discrimination." A very similar question arose in *State of J. & K. v. Triloki Nath Khosa*,<sup>5</sup> where a rule which provided that only degree holders in the cadre of Assistant Engineers shall be entitled to be considered for promotion to the next higher cadre of Executive Engineers and diploma holders shall not be eligible for such promotion, was challenged as violative of the equal opportunity clause. The Supreme Court repelled the challenge holding that "though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for the purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications" and "the rule providing that graduates shall

1. *Mangalal Chhagganlal P. Ltd. v. Municipal Corp.*, 1974 SC 2009 (2026).

2. *State of Rajasthan v. Mukanchand*, (1964) 6 SCR 903; 1964 SC 1633.

3. (1968) 1 SCR 407 : 1968 SC 349.

4. (1973) 3 SCC 592 : 1973 SC 811.

5. (1974) 1 SCC 19 : 1974 SC 1.

be eligible for such promotion to the exclusion of diploma holders" was not obnoxious to the fundamental guarantee of equality and equal opportunity.

But from these decisions it cannot be laid down as an invariable rule that whenever any classification is made on the basis of variant educational qualifications, such classification must be held to be valid, irrespective of the nature and purpose of the classification or the quality and extent of the differences in the educational qualifications. It must be remembered that "life has relations not capable always of division into inflexible compartments." The moulds expand and shrink. The test of reasonable classification has to be applied in each case on its peculiar facts and circumstances. It may be perfectly legitimate for the administration to say that having regard to the functions and duties attached to the post, for the purpose of achieving efficiency in public service, only degree holders in engineering shall be eligible for promotion and not diploma or certificate holders. That is what happened in *State of J. & K. v. Triloki Nath Khosa*.<sup>1</sup> But where graduates and non-graduates were both regarded as fit and, therefore, eligible for promotion, it is difficult to see how, consistently with the claim for equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each and giving preferential treatment to graduates over non-graduates in the matter of fixation of such quota. - The result of fixation of quota of promotion for each of the two categories of Supervisors would be that when a vacancy arises in the post of Assistant Engineer, which, according to the quota is reserved for graduate Supervisors, non-graduate Supervisor cannot be promoted to that vacancy, even if he is senior to all other graduate Supervisors and more suitable than they. His opportunity for promotion would be limited only to vacancies available for non-graduate Supervisors. That would clearly amount to denial of equal opportunity to him. When there is a vacancy earmarked for graduate Supervisors, a non-graduate Supervisor would be entitled to ask: "I am senior to the graduate Supervisor who is intended to be promoted. I am more suitable than he is. It is no doubt true that I am a non-graduate, but my not being a graduate has not been branded as a disqualification. I am regarded fit for promotion and, like the graduate Supervisor, I am equally eligible for being promoted. My technical equipment supplemented by experience is considered adequate for discharging the functions of Assistant Engineer. Then why am I being denied the opportunity for promotion and the graduate Supervisor is preferred?" There can be no satisfactory answer to this question. It must be remembered that many of these non-graduate Supervisors might not have been able to obtain degree in engineering because they came from poorer families and did not have the financial resources to pursue degree course in engineering and not because they lacked the necessary capacity and intelligence "Chill penury" might have "repressed their noble rage." It is of the essence of equal opportunity for such persons with humble and depressing back-grounds that they should have opportunity, through experience or self-study, to level up with their more fortunate colleagues who, by reason of favourable circumstances, could obtain the benefits of higher education, and if they prove themselves fit and more suitable than others, why should they be denied an opportunity to be promoted in a vacancy on the ground that the vacancy belongs to Supervisors possessing higher educational qualifications. As pointed out by Krishna Iyer, J., in *State of J. & K. v. Triloki Nath Khosa*,<sup>2</sup> "the soul of Art. 16 is the promotion of the common man's

1. (1974) 1 SCC 19 : 1974 SC 1.

2. *Ibid.*

capabilities, over-powering environmental adversities and opening up full opportunities to develop in official life without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule". To permit discrimination based on educational attainments not obligated by the nature of the duties of the higher post is to stifle the social thrust of the equality clause. A rule of promotion which while conceding that non-graduate Supervisors are also fit to be promoted as Assistant Engineers, reserves a higher quota of vacancies for promotion for graduate Supervisors as against non-graduate Supervisors would clearly be calculated to destroy the guarantee of equal opportunity. But even so, we do not think we can be persuaded to strike down the Andhra Pradesh Rules in so far as they make differentiation between graduate and non-graduate Supervisors. This differentiation is not something brought about for the first time by the Andhra Pradesh Rules. It has always been there in the Engineering Services of the Hyderabad and the Andhra States. The graduate Supervisors have always been treated as a distinct and separate class from non-graduate Supervisors both under the Hyderabad Rules as well as the Andhra Rules and they have never been integrated into one class. Under the Hyderabad Rules the pay scale of graduate Supervisors was Rupees 176-300, while that of non-graduate Supervisors was Rupees 140-300 and similarly, under the Andhra Rules the pay scale of non-graduate Supervisors was Rupees 100-250, but graduate Supervisors were started in this pay scale at the stage of Rupees 150 so that their pay-scale was Rs. 150-250. Graduate Supervisors and non-graduate Supervisors were also treated differently for the purpose of promotion under both sets of Rules. In fact, under the Andhra Rules a different nomenclature of Junior Engineer was given to graduate Supervisors. The same differentiation into two classes also persisted in the reorganised State of Andhra Pradesh. The pay-scale of Junior Engineers was always different from that of non-graduate Supervisors and for the purpose of promotion. The two categories of Supervisors were kept distinct and apart under the Andhra Rules even after the appointed day. The common gradation list of Supervisors finally approved by the Government of India also consisted of two parts, one part relating to Junior Engineer and the other part relating to non-graduate Supervisors. The two categories of Supervisors were thus never fused into one class and no question of unconstitutional discrimination could arise by reason of differential treatment being given to them.<sup>1</sup>

#### 10 25. *Dissimilar treatment.*

Disimilar treatment does not necessarily offend against the guarantee of equality contained in Article 14 of the Constitution. The rider is that there has to be a valid basis for classification and the classification must bear *nexus* with the object of the impugned provision. In matters arising out of reorganisation of States, continued application of laws of States, continued application of laws of a State to territories, which were within that State but which later became a part of another State, was not discriminatory since the classification rested on geographical consideration founded on historical reasons.<sup>2</sup>

#### 10-26. *Classification—Historical Reasons.*

In *State of Rajasthan v. Manohar Singh*,<sup>3</sup> the Supreme Court accepted that historical reasons may justify differential treatment of separate geographi-

1. *Mohd. Shujat Ali v. Union of India*, 1974 SC 1631 (1654-1656).

2. *Sri Swamiji of Shri Admar Mutt. v. Commr. of Hindu Religious and Charitable Endowments*, 1980 SC 1 (9).

3. 1954 SCR 996 : 1954 SC 297.

cal regions provided it bore a reasonable and just relation to the matter in respect of which it was proposed, but the differentiation in that case was regarded as infringing the equal protection of the laws because members of the same class were treated in a manner *ex facie* discriminatory, and no attempt was made by the State to justify the treatment as founded upon a rational basis having a just relation to the impugned statute.

In *Sikander Jehan v. A. P. State Government*<sup>1</sup> the object of the legislature was to validate the orders of the authorities passed between September 18, 1948 and March 14, 1952. The first date referred to the commencement of the Police action and the latter to the commencement of the Act. Between these two dates events of historical importance had taken place in the state of Hyderabad and so treating that period as of unusual significance it was not open to any criticisms. If the legislature chose to deal with the orders passed during that period as constituting a class by themselves and that itself the Supreme Court said could not be said to contravene Article 14.

In *Mohan Lal v. Sawai Man Singh*,<sup>2</sup> the question was whether Section 87-B of the Code of Civil Procedure was *ultravires*. It was argued that it discriminated in favour of ex-Rulers of the Indian States by creating an immunity from Civil action. Hidayatullah, J. speaking for the Court said: "It is easy to see that the ex-Rulers, formed a class and special legislation was based upon historical considerations applicable to them as a class. A law made as a result of these considerations must be treated as based upon a proper classification of such Rulers. It was based upon a distinction which could be described as real and substantial and it bore a just relation to the object sought to be attained."

#### 10-27. Classification—Geographical Reasons.

The Supreme Court has held that equality clause did not forbid geographical classification provided the difference between the geographical units had reasonable relation to the object sought to be actioned.<sup>3</sup> A State can make a territory within a city a unit for the purpose of taxation. In *Gopal Narain v. State of U. P.*<sup>3</sup> the Supreme Court held that the impugned Section 128 of the U.P. Municipalities Act in permitting in the matter of taxation geographical classification old city and Civil Line area which had reasonable relation to the object of the statute, namely for providing amenities for particular, unit the peculiar circumstances whereof demand than, did not in any way impugne upon equality clause.

In *Gopichand v. Delhi Administration*,<sup>4</sup> the classification was made on a territorial or geographical basis. The legislature thought it expedient to provide for the speedy trial of the specified offences in areas which were notified to be dangerously disturbed areas and for that purpose the area in the State had been put in two categories; those that were dangerously disturbed and others. The court held that the classification was formed on an intelligible differentiation. In *K. Gopaul v. Union of India*,<sup>5</sup> the Supreme Court said that it was not necessary that similar posts in all states in India must all be placed in the same cadre. The Government may consider at desirable that a particular post

1. 1962 SC 996 (1000).

2. 1962 SC 73 (75).

3. *Gopal Narain v. State of U. P.*, 1964 SC 370 (375).

4. 1959 SC 611 (614).

5. 1967 SC 1864 (1868).



in one state should be placed on the Cadre of the Indian Administrative Service, whereas in another State it may not be considered advisable to do so, a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act, are distinct things and what is necessary is that there must be a *nexus* between them.<sup>1</sup>

### 10.28. *Single Person.*

A law applying to one person or one class of person is constitutional if there is sufficient basis or reason for it.<sup>2</sup> In *Charanjit Lal Chowdhury v. Union of India*,<sup>3</sup> the question was whether a law providing for the management and control by the Government of a named Company, the *Sholapur Spinning and Weaving Co. Ltd.* offended Article 14. The Supreme Court held that even a single company might having regard to its features, be a category in itself and that unless it was shown that there were other companies similarly circumstanced the legislation must be presumed to be constitutional and the attack under Article 14 failed. A law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself,<sup>4</sup> on the principles stated above the Patiala State Bank was held to be a class by itself and it was well within the power of the State to enact a law with respect to it.<sup>5</sup> A single institution may be taken as a class (1).<sup>6</sup>

A statute may direct its provisions against one individual person or thing, or against several individual persons or things. But before such a provision can be accepted as valid, the Court must be satisfied that there is a reasonable basis of classification which appears on the face of the statute itself, or is deducible from the surrounding circumstances or matters of common knowledge. If no such reasonable basis of classification appears on the face of the statute, or is deducible from the surrounding circumstances, the law will have to be struck down as an instance of naked discrimination.<sup>7</sup>

Article 14 can have no application where the sources of authority of the Parliament and the State Legislation are different.<sup>8</sup>

In *Atlas Cycle Industries Ltd. v. Their Workmen*,<sup>9</sup> it was contended that Punjab Act No. 8 of 1957 which raised the age of retirement violated Article 14 as it was enacted to benefit a particular individual Gujaral. This contention was negatived as the impugned enactment was of general application; the age being raised to sixty seven with reference to all persons holding the office under that section. The occasion which inspired the enactment of statute might be to the impending retirement of Gujaral, but that was not a

1. *State of West Bengal v. Anwar Ali*, 1952 SCR 284 : AIR 1952 SC 75.

2. *Wills : Constitutional Law*, 580 approved by Supreme Court in 1950 SCR 869 : 1951 SC 41.

3. 1950 SCR 869 : 1951 SC 41.

4. *Ram Krishna Dalmia v. Tendolkar*, 1959 SCR 279 (297) : 1958 SC 538 (547) ; *Shri Govindlalji v. State of Rajasthan*, 1963 SC 1638 (1659).

5. *Lachhman Das v. State of Punjab*, 1963 SC 222 (228).

6. *S. P. Mittal v. Union of India*, 1983 SC 1 (40) ; *Ram Prasad Narayan Sahi v. State of Bihar*, 1973 SCR 1129 : 1953 SC 215.

7. *Vice Chancellor Osmania University v. Chancellor*, 1967 SC 1305 (1313).

8. *Bar Council U. P. v. State of U. P.*, 1973 SC 231 (239)

9. 1963 SC 1100

ground for holding that it was discriminating and contravened Article 14, when it was on its terms of general application.

In *Ameerunnissa v. Mahboob*,<sup>1</sup> the legislation related to the estate of one Nawab Waliuddoula and it provided that the claims of Mahboob Begum and Kadirau Begum who claimed as heirs stood dismissed thereby and could not be called in question in any court of law. The Supreme Court held that it was repugnant to Article 14 as it singled out individuals and denied them the right which the other citizens had to resort to a Court of Law.

In *State of J. K. v. Bakshi Gulam Mohammad*,<sup>2</sup> it was contended that by picking *Bakshi Gulam Mohammad* out of the entire cabinet for the purpose of the inquiry, the Government had discriminated against him in a hostile way. The Supreme Court considered the contention untenable. It was said that: "Let us assume that all the members of the Cabinet assisted *Bakshi Gulam Mohammad* in his acquiring wealth. This is not said that other members had acquired wealth by these acts. He was therefore in a class by himself. This classification had further rational connection with the setting up of the commission for the object, was to find out whether the wealth had been acquired by *Bakshi Gulam Mohammad* by the abuse of official position.

In *Vice Chancellor v. Chancellor*<sup>3</sup> the term of office fixing the period of three years for the Vice Chancellor had been effected by the First Amendment Act and therefore the differential principle adopted for terminating the service of the appellant by enacting section 13-A of the Act could not be considered to be justified. In other words the differentia adopted in Section 13-A and directed as against the appellant and the appellant alone could not be considered to have a rational relation to the object sought to be achieved by the second amendment Act.<sup>3</sup>

In *Tilkayat Shri Govindlal Ji v. State of Rajasthan*<sup>4</sup> the Supreme Court observed that "a law may be constitutional even though it relates to a single individual, if on account of some special circumstances or reasons applicable to him and not applicable to others, that a single individual may be treated as a class by himself." The attack under Art 14 on the constitutionality of the law with respect to the temple of Nathdwara was repelled on the ground that the temple had a unique position amongst the Hindu Shrines in the State of Rajasthan and no temple could be regarded as comparable with it. The same reasons were applied to Shri Jamannath Temple in *Bera Keshore Debi v. State Orissa*,<sup>5</sup> and Sri Jagannath Temple Act was not struck down under Article 14.<sup>6</sup>

In *Shastri Pyv. Union of India*<sup>7</sup> the impugned memorandum regarding the use of air craft by the Prime Minister for non-official purposes was challenged as violative of Article 14 but the court held that the Prime Minister in view of the importance and the nature of duties of her office constituted a class by herself.

1. 1953 SCR 404 : 1953 SC 91.

2. 1967 SC 122.

3. 1967 SC 1305 (1314).

4. 1963 SC 1638.

5. 1964 SC 1504.

6. 1964 SC 1504 (1507) ; *Ram Chandra Deb v. State of Orissa*, 1959 Orissa 5.

7. 1974 Delhi 1 (8).

## 10-29. Classification—Procedural Law.

A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.<sup>1</sup>

Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure as in *Anwar Ali Sarkar's*<sup>2</sup> case without any guidelines as to the classes of cases in which either procedure is to be resorted to, the statute will be hit by Article 14.<sup>3</sup>

In *Anwar Ali Sarkar's* case the court considered the Act "to provide for the speedier trial of certain offences." The Supreme Court by majority came to the conclusion that the necessity for speedier trial of offences did not provide a reasonable basis of classification and the procedure laid down by the Act for trial by special courts varied substantially from that laid down for the trial of offences generally by the Code of Criminal Procedure and as it left to the uncontrolled discretion of the State Government to direct any case, it liked to be tried by the Special Court, it was void.

The case of *Lachman Das Kewal Ram v. State of Bombay*<sup>4</sup> came in the category of *Anwar Ali Sarkar's* case. Section 12 of the Bombay Public Safety measures Act, 1947 empowered the Government to refer cases for trial by a Special Judge. It was held void as it did not purport to proceed on any classification.

In *Surajmall Mohta v. Visvanath Sastri*<sup>5</sup> the court had to deal with Section 5 (4) of the Taxation on Income (Investigation Commission) Act, 1947. This Act dealt with the same class of persons who fell within the ambit of Section 34 of the Income Tax Act and as both these sections dealt with all persons who had similar characteristics and similar properties, the common characteristics being that they were persons who had not truly disclosed their income and had evaded payment of taxation on income. The procedure prescribed by the Taxation on Income (Investigation Commission) Act was substantially prejudicial and more drastic to the assessee than the procedure under the Income Tax Act. The court held that Section 5 (4) was a piece of discriminatory legislation and offended against the provisions of Article 14 and was thus void. As in *Anwar Ali Sarkar's* case there was no indication as to why certain cases should be sent to the commission and certain cases were dealt with by the Income Tax Authorities. The decisions in *Shree Minakshi Mills Ltd. v. Visvanath Sastri*,<sup>6</sup> and *Multiah v. Commissioner of Income Tax*<sup>7</sup> are on the same lines as in *Surajmall Mohta's* case. In such cases if from the preamble, and surrounding circumstances, as well as from the provisions of the statute, themselves explained and amplified by affidavits necessary guidelines could be inferred

1. *State of West Bengal v. Anwar Ali*, 1952 SC 75 (89), Mukherjea, J.
2. 1952 SCR 2 : 1952 SC 75.
3. *Chhagan Lal v. Greater Bombay Municipality*, 1974 SC 2009 (2022).
4. 1952 SCR 710 : 1952 SC 235.
5. (1955) 1 SCR 448 : 1954 SC 545.
6. (1955) 1 SCR 787 : 1955 SC 13.
7. (1955) 2 SCR 1247 : 1956 SC 269.

as in *Kathi Raning Rawat v. State of Saurashtra's*<sup>1</sup> case and *Jyoti Prasad's*<sup>2</sup> case the statute will not be hit by Article 14.<sup>3</sup>

In *Jyoti Prasad v. Administrator*,<sup>4</sup> it was urged that Section 19 (3) of the Slum Areas Act vested an unguided, unfettered and uncontrolled power in an executive officer to withhold permission to execute a decree which the petitioner had obtained, offended Article 14. The Supreme Court said : "When the Legislature vests a discretion in the authority, be it the Government or an administrative official either acting as an executive officer, or even in a quasi judicial capacity by a legislation which does not lay down any policy or disclose any tangible or intelligible purpose, thus clothing the authority with unguided and arbitrary power enabling it to discriminate, the very provision of the law which enables or permits the authority to discriminate offends the guarantee of equal protection afforded by Article 14. It is not, however, essential for legislation to comply with the rule as to equal protection that the rules for the guidance of the designated authority which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself. Such guidelines may be obtained from or afforded by (a) the preamble read in the light of the surrounding circumstances which necessitated the legislation taken in conjunction with well known facts of which the court might take judicial notice or of which it is appraised by evidence before it in the form of affidavits, (b) or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the objects sought to be achieved by the enactment."

Where the statute itself covers only a class of cases as in *Halldar's*<sup>5</sup> case and *Bajoria's* case<sup>6</sup> the statute will not be bad.<sup>7</sup> The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not affect the validity of the statute.

In the next case *Thangal Kunju Musaliar v. M. Venkatachalam*,<sup>8</sup> a case was referred by the Government of the United State of Travancore and Cochin under Section 5 (1) of the Travancore Taxation on Income (Investigation Commission) Act, 1124 modelled on the Indian Taxation on Income (Investigation Commission) Act, 1947, for investigation by the Travancore Income Tax Investigation Commission in 1949. In 1950 the Indian Act was extended to Travancore and Cochin and the Travancore Act was allowed to continue to be in force with certain modifications. It was held that Section 5 (1) of the Travancore Act XIV of 1124 read in juxtaposition with Section 47 of the Travancore Income-Tax Act, 1121 (XXIII of 1121) was not discriminatory because Section 47 (1) of the Travancore Act XXIII of 1121 was directed only against those person concerning whom definite information came into the possession of the Income-tax Officer and in consequence of which the Income-tax Officer discovered that the income of those persons had escaped or been under assessed or assessed at too low a rate or had been the subject

1. 1952 SCR 435 : 1952 SC 123.
2. (1962) 2 SCR 125 : 1961 SC 1602.
3. *Maganlal Chhagan Lal v. Greater Bombay Municipality*, 1974 SC 2009 (2022).
4. (1962) 2 SCR 125 : 1961 SC 1602 (1609).
5. (1960) 2 SCR 646 ; 1960 SC 457.
6. 1954 SCR 30 : 1953 SC 404.
7. *Maganlal Chhaganlal v. Greater Bombay Municipality*, 1974 SC 2009 (2022).
8. (1955)-2 SCR 1196 : AIR 1956 SC 246.

of excessive relief, and the class of persons envisaged by Section 47 (1) was a definite class about which there was definite information leading to discovery within 8 years or 4 years as the case may be of definite item or items of income which had escaped assessment. On the other hand under Section 5 (1) of the Travancore Act XIV of 1124 the class of persons sought to be reached comprised only those persons about whom there was no definite information and no discovery of any definite item or items of income which escaped taxation but about whom the Government had only *prima facie* reason to believe that they had evaded payment of tax to a substantial amount. Further, it was definitely limited to the evasion of payment of taxation on income made during the war period, whereas Section 47 (1) of the Travancore Act XXIII of 1121 was not confined to escapement from assessment of income-tax made during the war period." It was, therefore, held that there was no discrimination. It would be noticed how thin is the line of distinction between the two lines of classification. But that was held as justifying the different treatment between two classes of cases. It is interesting to note that in *Suraj Mall Mohta's case*<sup>1</sup> the provision of Section 5 (1) of the Taxation on Income (Investigation Commission) Act (Act XXX of 1947) referring to the class of "substantial evaders of Income-Tax" who required to be specially treated under the drastic procedure provided in that Act was held not to provide a valid classification. But in this case the word "substantial" was by reference to Stroud's Judicial Dictionary and the statement of law by *Viscount Simon in Pulser v. Grinling*<sup>2</sup> taken along with an affidavit filed in the case, held to mean "class of persons who are intended to be subjected to this drastic procedure." It was also held that the possibility of such discriminatory treatment of persons falling within the same group or category, however, cannot necessarily invalidate this piece of legislation and that it was to be presumed, unless the contrary were shown, that the administration of a particular law would be done "not with an evil eye and unequal hand" and the selection made by the Government of the cases of persons to be referred for investigation by the Commission would not be discriminatory." Reference was made to the judgment of Mukherjea, J., in the *Kathi Raning Rawat v. Saurashtra*<sup>3</sup> case to the effect :

".....In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion, it has to be exercised in conformity with the policy to effectuate which the direction is given and it is in relation to that objective that the propriety of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature its action can certainly be annulled offending-against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied."

### 10-30. Special Procedure—Special Courts.

The contention that the special procedure prescribed for trial before Special Courts violated the guarantee of equality conferred by Art. 14 was

1. (1955) 1 SCR 448 : AIR 1954 SC 545.
2. 1948 AC 291 (317).
3. 1952 SCR 435 : AIR 1952 SC 123.

raised specifically and was considered by the Supreme Court in *State of West Bengal v. Anwar Ali Sarkar*,<sup>1</sup> *Kathi Raning Rawat v. State of Saurashtra*,<sup>2</sup> *Lachmandas Kewalram Ahuja v. State of Bombay*,<sup>3</sup> *Habeeb Mohamed v. State of Hyderabad*,<sup>4</sup> *Kedar Nath Bajoria v. State of West Bengal*,<sup>5</sup> and *Asgarali Nazarali Singaporawalla v. State of Bombay*.<sup>6</sup> The procedure prescribed by the various laws in these cases was, almost without exception, held to be discriminatory, since the special procedure was more harsh and onerous than the ordinary procedure prescribed for the trial of offences. If the classification was valid, persons who were grouped together and who were distinguished from others who were left out of the group on an intelligible differentia could legitimately be tried by a different procedure, even if it was more onerous, provided the differentia had a rational relation to the object sought to be achieved by the statute in question.<sup>7</sup>

In *State of West Bengal v. Anwar Ali Sarkar*,<sup>8</sup> it was held by the majority that Section 5 (1) of the West Bengal Special Courts Act, 1950 was wholly void since it conferred arbitrary power on the Government to classify offences or cases at its pleasure and the Act did not lay down any policy or guidelines for the exercise by the Government of its discretion to classify cases or offences.

In *Kathi Raning Rawat*,<sup>9</sup> case Section 11 of Saurashtra State Public Safety Measures Ordinance, 1949 was impugned. *Anwar Ali Sarkar's* case was distinguished because the Government had sufficient guidance for classifying offences, classes of offences or classes of cases for being tried by the special procedure.

In *Lachmandas v. State of Bengal*,<sup>10</sup> a Bank dacoity case was referred for trial to a Special Judge by the Bombay Government under Section 12 of the Bombay Public Safety Measures Act, 1947 which was precisely in the same terms as Section 5 (1) of the West Bengal Act and Section 11 of the Saurashtra Ordinance. The question was squarely covered by the *ratio* of the decisions in *Anwar Ali Sarkar*<sup>11</sup> and *Kathi Raning Rawat*,<sup>12</sup> by the application of which the majority held that on a parity of reasoning Section 12 was unconstitutional to the extent to which it authorised the Government to direct particular "cases" to be tried by a Special Judge. Patanjali Shastri, C. J., did not differ from the majority on this aspect of the matter. He held that granting that the particular part of Section 12 was discriminatory in view of the decision in *Anwar Ali Sarkar*, the trial which had already started could not be vitiated by the Constitution coming into force subsequently.

In *Kedar Nath Bajoria*,<sup>13</sup> the case of the appellants and two others was allotted by the State Government to the Special Court which was constituted

1. 1952 SCR 284 : AIR 1952 SC 75.
2. 1952 SCR 435 : AIR 1952 SC 123.
3. 1952 SCR 710 : AIR 1952 SC 235.
4. 1953 SCR 661 : AIR 1953 SC 287.
5. 1954 SCR 30 : AIR 1953 SC 404.
6. 1957 SCR 678 : AIR 1957 SC 503.
7. *In re Special Courts Bill*, 1978, 1979 SC 478 (504).
8. 1952 SCR 284 : AIR 1952 SC 75.
9. 1952 SCR 435 : AIR 1952 SC 123.
10. 1952 SCR 710 : AIR 1952 SC 235.
11. AIR 1952 SC 75.
12. AIR 1952 SC 123.
13. AIR 1957 SC 404.

by the Government under Section 3 of the West Bengal Criminal Law Amendment Act, 1949. The appellant's contention that Section 4 of the Act under which the State Government had allotted their case to the Special Court violated Art. 14 by the application of the ratio in *Anwar Ali Sarkar*<sup>1</sup> was rejected by the majority. Viewed against that background, the Court considered that offences mentioned in the Schedule to the Act were common and widely prevalent during the particular period and it was in order to place an effective check upon those offences that the impugned legislation was thought necessary. Such a legislation, according to the majority, under which Special Courts were established to deal with special types of cases under a shortened and simplified procedure, was based on a perfectly intelligible principle of classification having a clear and reasonable relation to the subject sought to be attained.

In *Asgarali Nazarali Singaporewalla v. State of Bombay*<sup>2</sup> the Criminal Law Amendment Act, 1952 enacted by the Parliament came into force whilst the appellant along with others was being tried before the Presidency Magistrate, Bombay for offences under section 161 read with Section 116 etc. of the Penal Code. The Act provided for the trial of offences of bribery and corruption by the Special Judges and for the transfer of all pending trials to such Judges. It was held by the Supreme Court unanimously that the Act did not violate Article 14 since the offences of bribery and corruption by public servants could appropriately be classified in one group or category. The classification which was founded on an intelligible differentia was held to bear a rational relationship with the object of the Act which was to provide for speedier trial of certain offences. An argument was pressed upon the Court which was based 'on the observations of Mahajan, J. and Mukherjea, J. in *Anwar Ali Sarkar*'s<sup>3</sup> respectively, that the speedier trial of offences could not afford a reasonable basis for classification. That argument apparently did not find favour with the Court which said<sup>4</sup> that the particular observations of the learned Judges in *Anwar Ali Sarkar*'s case might standing by themselves lend support to the argument but the principle underlying those observations was not held to be conclusive by the Supreme Court in *Kedar Nath Bajoria* case.<sup>5</sup>

Equal protection claims under article 14 are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies. The power of the State to regulate criminal trials by constituting different courts with different procedures according to the needs of different parts of its territory is an essential part of its police power.<sup>6</sup> Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient, to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands as, for instance, when it amounts to a denial of a fair and impartial trial. It is, therefore, not correct to say that Article 14 provides no further constitutional protection to personal liberty than what is afforded

1. AIR 1952 SC 75.

2. AIR 1957 SC 503.

3. 1952 SCR 284 (314) (328) : AIR 1952 SC 75 (86) (91).

4. 1953 SCR : 69 AIR 1957 SC 508.

5. AIR 1953 SC 404.

6. Cf. *Bowman v. Lewis*; (1880) 101 U.S. 22, referred in 1952 SC 126

by Article 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, Article 14 remains an important bulwark against discriminatory procedural laws.<sup>1</sup>

Special courts were set up during the British regime on a number of occasions, more especially under what may broadly be termed as Security laws like the Rowlatt Act, 1919, the Bengal Provincial Law (Amendment) Act, 1925, the Sholapur Martial Law Ordinance, 1930, the Bengal Criminal Law (Amendment) Act, 1930 and 1932, the Bihar Maintenance of Public Order Act, the Bombay Public Safety Measures Act, 1947, the C. P. and Berar Public Safety Act and U. P. Maintenance of Public Order Act. These laws were draconian in nature and were characterised by a denial of the substance of a fair trial to those who had the misfortune to fall within the sweep of the truncated procedure prescribed by them. They provided a summary procedure for deprivation of the right to life and liberty without affording to the aggrieved person the opportunity to carry an appeal to the High Court for a dispassionate examination of his contentions. Special Courts were set up under these laws mostly to suppress the freedom movement in India. They were not set up purportedly to save a democracy in peril. Therefore, they inevitably acquired a sinister significance and odour.

After the advent of independence and the enactment of our Constitution, Special Courts were set up under various laws to deal with threats to public order and to prevent corruption amongst public servants. In the years following upon the inauguration of the Constitution, 1950, the Supreme Court had to consider the validity of laws under which various State Governments were empowered by the State Legislatures to set up Special Courts for the trial of such offences or classes of offences or cases or classes of cases as the State Government may be general or special order in writing direct. The earliest case, after the Constitution came into force, which refers to the setting up of Special Tribunals is *Janardhan Reddy v. State of Hyderabad*,<sup>2</sup> in which the Military Governor of Hyderabad, by virtue of the powers delegated to him by the Nizam, constituted Special Tribunals which consisted of three members appointed by him for offences referred to them by the Governor by a general or special order. But the decision in that case turned on the question whether the judgment of the Hyderabad High Court which was pronounced before January 26, 1950 and which had acquired a finality could be reopened before the Supreme Court under the provisions of the Constitution. That question was answered in the negative and no argument arose or was made regarding the violation of Article 14.

Since certain commissions of inquiry appointed by the Central Government under the Commissions of Enquiry Act, 1952 had submitted their reports which indicated that there was reason to believe that various offences had been committed by persons holding high political and public office during the period of operation of the Proclamation of Emergency dated June 25, 1975, a proposal was made that legislation should be enacted for the creation of Special Courts for the speedy trial of such offences. But as there was likelihood of the constitutional validity of such enactment to be challenged, the President referred the following question to the Supreme Court under Article 143 of the Constitution.

“Whether the Bill or any provisions thereof, if enacted would be constitutionally valid”.

1. *Kathi Raning Rawat v. State of Saurashtra*, 1952 SC 123 (126).

2. 1951 SCR 344 : AIR 1951 SC 217.



The reference was heard by the Supreme Court and the validity of the Bill excepting a few provision was upheld.<sup>1</sup>

### 10-31. *Two Remedies and Recovery of public dues.*

In the *Northern India Caterers v. Lt. Governor of Delhi*<sup>2</sup> the question arose under the Punjab Public Premises and Land (Eviction and Rent Recovery) Act of 1959. The majority consisting of Subba Rao, C.J., and Shelat and Vaidialingam, JJ., accepted that there was an intelligible differentia between the two classes of occupiers, namely, occupiers of public property and premises and occupiers of private property and that it was in the interest of public that speedy recovery of rents and speedy eviction of unauthorised occupiers was made possible through the instrumentality of a speedier procedure. They thought that as Section 5 of the Act conferred an additional remedy over and above the remedy by way of suit leaving it to the unguided discretion of the Collector to resort to one or the other by picking and choosing some of those in occupation of public properties and premises for the application of the more drastic procedure under Section 5, that section laid itself open to the charge of discrimination as being violative of Article 14, and in that view they held that the section was void.

The minority consisting of Hidayatullah and Bachawat, JJ., held that the impugned Act made no unjust discrimination among the occupants of Government properties *inter se*, that it promoted public welfare and was a beneficial measure of legislation, that it was not unfair or oppressive and that the unauthorised occupant was not denied equal protection of the laws merely because the Government had the option of proceeding against him either by way of a suit or under the Act. They further held that "an unauthorised occupant had no constitutional right to dictate that the Government should have no choice of proceedings, and that the argument based upon the option of the Government to file a suit was unreal because in practice the Government was not likely to institute a suit in a case when it could seek relief under the Act."

In *Manganlal Chhagganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay*,<sup>3</sup> two parallel procedures, one under Chapter V-A of the Bombay Municipal Corporation Act, 1888 and the other under the Bombay Government Premises (Eviction) Act, 1955, were available for eviction of persons from public premises. The constitutional validity of the relevant provision of the two Acts was challenged on the ground that they contravened Article 14, since the procedure prescribed by the two Acts was made drastic and prejudicial than the ordinary procedure of a Civil Suit and it was left to the arbitrary and unfettered discretion of the authorities to adopt such special procedure against some and the ordinary remedy of civil suit against others. The constitutional validity of the relevant provisions of the two Acts was challenged on the ground that they contravened Article 14, since the procedure prescribed by the two Acts was more drastic and prejudicial than the ordinary procedure of a suit and it was left to the arbitrary and unfettered discretion of the authorities to adopt such special procedure against some and the ordinary remedy of civil suit against others.

1. *In re. the Special Courts Bills*, 1978, 1979 1 SC 380.

2. 1967 SC 1581.

3. 1974 SC 2009 (2015) : 1975 1 SCR 1.

The question was whether the decision of the Supreme Court reached by the majority in *Northern India Caterers' case* was correct. Ray, C. J., Aligiri Swami, Palekar and Mathew, JJ., did not agree with the majority. Khanna, J. held that it was not necessary, for the purpose of the case to overrule the majority decision.

Bhagwati and Krishna Iyer, JJ., held that the majority in *Northern India Caterer's case* did not represent the correct law. On the merits of the procedure prescribed by the two Acts it was held by the Court that it was not so harsh or unconscionable as to justify the conclusion that a discrimination would result if resort to them had been taken in some cases and to the ordinary procedure of civil courts in others. By a separate but concurring judgment Bhagwati, J., and V. R. Krishna Iyer, J. held that it was inevitable that when a special procedure was prescribed for a defined class of persons, such as occupiers of Municipal or Government premises, discretion which was guided and controlled by the underlying policy and purpose of the legislation had necessarily to be vested in the administrative authority to select occupiers of Municipal or Government premises for bringing them within the operation of the special procedure. The learned Judges further observed that minor differences between the special procedure and the ordinary procedure was not sufficient for invoking the inhibition of the equality clause and that it could not be assumed that merely because one procedure provided the forum of a regular court while the other provided for the forum of an administrative tribunal, the latter was necessarily more drastic and onerous than the former. Therefore, said the learned Judges, whenever a special machinery was devised by the legislature entrusting the power of determination of disputes to an authority set up by the legislature in substitution of regular courts of law, one should not react adversely against the establishment of such an authority merely because of a certain predilection for the prevailing system of administration of justice by courts of law. In the context of the need for speedy and expeditious recovery of public premises for utilisation for important public uses, where dilatoriness of the procedure might defeat the very object of recovery, the special procedure prescribed by the two Acts was held not to be really and substantially more drastic and prejudicial than the ordinary procedure of a civil court. The special procedure prescribed by the two Acts, it was observed, was not so substantially and qualitatively disparate as to attract the vice of discrimination.

In *Magan Lal's case*,<sup>1</sup> it was observed that one finds it difficult to reconcile oneself to the position that the mere possibility of resort to the Civil Court should make invalid a procedure which would otherwise be valid. It can very well be argued that as long as a procedure does not by itself violate either Article 19 or Article 14 and is thus constitutionally valid, the fact that procedure is more onerous and harsher than the procedure in the ordinary Civil Court, should not make that procedure void merely because the authority competent to take action can resort to that procedure in the case of some and ordinary civil court procedure in the case of others. That a constitutionally valid provision of law should be held to be void because there is a possibility of its being resorted to in the case of some and the ordinary civil court procedure in the case of others somehow makes one feel uneasy and that has been responsible for the attempts to get round the reasoning which is the basis in the decision in *Northern India Caterers v. State of Punjab*.<sup>2</sup>

It was further held that if from the preamble and surrounding circumstances as well as provisions of the statute themselves explained and amplified

1. 1974 SC 2009 (2040-41).

2. (1967) 3 SCR 399 : AIR 1967 SC 1581.

by affidavits necessary guidelines can be inferred the statute will not be hit by Article 14. The provisions in Revenue Recovery Act and other Acts creating special tribunals and procedure for expeditious recovery of revenue and State dues are held to be in public interest and do not violate Article 14.<sup>1</sup>

Regarding the validity of two remedies for recovery of sales tax, the Supreme Court in *State of Kerala v. C. M. Francis & Co.*,<sup>2</sup> held that if two remedies are open, both can be resorted, at the option of the authorities recovering the amount unless the Statute in express words lays down that one remedy is to the exclusion of the other. The two remedies that were available in the case were, one under Section 13 of the Act which provided that if the tax is not paid it may be recovered as if it were an arrear of land revenue and the other Section 19 which provided that any person who failed to pay within the time allowed any tax assessed on him under the Act shall on conviction by the Magistrate of the First Class be liable to pay fine which may extend to one thousand rupees. This Court after observing that the question that arose was whether Section 19 should prevail over Section 13 of the Act stated that 'both the sections lay down mode of recovery of arrears of tax and as has already been noticed by the High Court, lead to the application of process of recovery by attachment and sale of moveable and immovable properties belonging to the tax evader and it cannot be said that one proceeding is more general than the other, because there is much that is common between them, in so far as mode of recovery is concerned'. Referring to Section 19 the Court observed that in addition to recovery of the amount, it gives power to the Magistrate to convict and sentence the offender to fine or in default of payment of fine, to imprisonment and expressed its opinion that neither of the remedies for recovery is destructive of the other, because if two remedies are open, both can be resorted to, at the option of the authorities recovering the amount. When two remedies, one under Section 22 (4-A) and another under Section 46 (1) (c) are available both can be resorted to at the option of the authorities recovering the amount but for Section 47-A. In the case of Income tax Act, referred in *State of Kerala v. C. M. Francis & Co.*,<sup>3</sup> the two remedies were, one by collection of the amount as an arrear of land revenue and the other by resorting to prosecution before the Criminal Court. In *Shanti Prasad Jain v. Director of Enforcement*,<sup>4</sup> the question arose whether discretion left to the executive to choose between two alternative procedure was discriminatory. Under Section 23-A, the Director of Enforcement may adjudge the matter himself and levy a penalty not exceeding three times the value of the foreign exchange, in respect of which the contravention had taken place or Rs. 5,000/- whichever was more or he may send it on to a court if he considered that a more severe penalty than he could impose was called for whereupon on a conviction by a court, the person was punishable with imprisonment for two years or fine. The Court observed that under Section 23-D, the necessary guidance was given in that at any stage of the enquiry the Director of Enforcement was of opinion that having regard to the circumstances of the case the penalty which he was empowered to impose would not be adequate he should instead of imposing any penalty must make a complaint in writing to the Court. As sufficient guidance was given regarding circumstances under which

1. *S. T. Commr. v. Radha Krishnan*, 1979 SC 1588 (1591).

2. 12 STC 119 : AIR 1961 SC 617.

3. *Ibid.*

4. (1963) 2 SCR 297 : AIR 1962 SC 1764.

cases can be transferred to the criminal court, the court held that the power was not unguided or arbitrary. In *Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi*,<sup>1</sup> the Supreme Court following the *Shanti Prasad Jain's* case (*supra*) held that the Director of Enforcement can only file a complaint by acting in accordance with proviso to Section 23-D (1) which clearly laid down that the complaint was only to be filed in those cases where at any stage of the inquiry the Director of Enforcement comes to the conclusion that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. In *Shanti Prasad Jain's* case (*supra*) as well as the *Rayala Corporation's* case (*supra*) there were clear guidelines as to when prosecution can be resorted to and on that basis the Court held that the power cannot be said to be unguided. The decision in *State of Kerala v C. M. Francis & Co* (*supra*) was not referred to in the two decisions. In *Ram Sarup v. Union of India*,<sup>2</sup> the question arose as to whether the power under Section 125 of the Army Act which empowered the officer either to try a case by court-martial or by an ordinary court or by a criminal court, was left entirely within his discretion without any guidance, was violative of Article 14 of the Constitution. The Court held that the choice as to which court should try the accused was left to the responsible military officers under whom the accused was serving and these officers were to be guided by consideration of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence was committed. When power is conferred on high and responsible officers they are expected to act with caution and impartiality while discharging their duties and the circumstances under which they will choose either of the remedies available should be left to them. The vesting of discretionary power in the State or public authority or an officer of high standing is treated as a guarantee that the power will be used fairly and with a sense of responsibility.

It has been held by the Privy Council in *Province of Bombay v. Bombay Municipal Corporation*,<sup>3</sup> that every statute must be supposed to be for public good at least in intention and therefore of few laws, could it be said that the law confers unfettered discretionary power since the policy of law offers guidance for the exercise of discretionary power. The guidance will have to be inferred from the policy of the law itself, that is, if on particular facts of a case the Commissioner who is an officer of high standing in exercise of his discretion comes to the conclusion that more drastic remedy should be taken, the exercise of that option cannot be termed as unconstitutional. In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. For sustaining the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds. It is well settled that courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional invalidity. These principles have given rise to rule of reading down the sections if it becomes necessary to uphold the validity of the sections. Under Section 46 before a prosecution can be launched, it is necessary that the assessee should have failed to pay the tax due within the time allowed without reasonable cause. The

1. (1970) 1 SCR 639 : AIR 1970 SC 494.

2. AIR 1965 SC 247.

3. 73 Ind Appeals 271 : AIR 1947 PC 34.

duty of the Commissioner is, therefore, to be satisfied that the assessee has failed without reasonable cause and without recourse to prosecution under Section 46 (1) (c) the tax due cannot be collected. The provisions of Section 22 (4-A) can be read as being applicable to cases in which the stringent step of prosecution is considered not necessary. The option is with the Commissioner and if he thinks levy of penalty would achieve the purpose of collection of the tax he can have recourse to the provisions of Section 22 (4-A). Before levying a penalty under Section 22 (4-A), the Commissioner shall give reasonable opportunity of being heard as to why the penalty should not be levied. Reading the two provisions harmoniously, the court was of the view that the discretion is given to the Commissioner to resort to one of the two remedies as the facts of the case may require. In graver cases he will be justified in taking the drastic remedy and resorting to prosecution in the criminal court if he is satisfied that such a course is necessary for the collection of the tax expeditiously. If the discretion is not properly exercised the court may be justified in interfering in such cases but the law cannot be held to be invalid. The Commissioner on the facts is fully justified in coming to the conclusion that resort to prosecution was necessary. On a consideration of the decisions on the point the court was satisfied that there is nothing illegal in conferring different procedures on the authorities.<sup>1</sup>

A law which provides for state fund being advanced to customers through State Bank can also provide for its being recovered in the same manner as Revenue. In *Manna Lal v. Collector of Jhalawar*,<sup>2</sup> the State of Jhalawar had established a Bank and the appellants as customers of the Bank owed large amounts to the Bank. Acting under Section 6 of the Rajasthan Public Demand Recovery Act, the Collector Jhalawar issued notice to the appellants proposing to recover the dues as a public demand. The validity of this demand was challenged on the ground that the provisions of the Act were obnoxious to Act 14 in that they enabled the State to recover the amounts due to it on banking accounts in a mode different from that applicable to the other Banks. In rejecting this contention the Supreme Court said: "It seems to us that Government even as a Banker can be legitimately be put in a separate class. The dues of the Government of a State are the dues of the entire people of the State. This being the position a law giving special facility for the recovery of such dues cannot in any event be said to offend Article 14." The same principles were applied by the Supreme Court in *Lachhman Das v. State of Punjab*.<sup>3</sup>

### 10-32. Pending Cases.

In *Anant Mills v. State of Gujarat*,<sup>4</sup> it was held that there was no violation of Art. 14 in treating pending cases as a class different from decided cases if all the pending cases had been treated alike. In *Rao Shiva Bahadur Singh v. State of Vindhya Pradesh*,<sup>5</sup> the Supreme Court observed: "But there is no reason why pending proceedings can not be treated by the legislature as a class by themselves having regard to the exigencies of the situation which such pending itself calls for."

Whenever a prior enactment is repealed and new provisions are enacted the legislature invariably lays down under which enactment pending proceeding

1. *S.T. Commr. v. Radhakrishanan*, 1979 SC 1558 (1593).
2. 1961 SC 828.
3. 1963 SC 222.
4. 1975 SC 1234 (1244).
5. 1953 SCR 1188 (1197) : 1953 SC 394 (397).

shall be continued and concluded. It is for the legislature to decide from which date a particular law should come into operation. In *Jain Bros. v. Union of India*,<sup>1</sup> it was urged that clause (g) of Section 297 (2) of the Income Tax Act, 1961 was violative of Art. 14 in as much as it discriminated between two sets of assesses in the matter of imposition of penalty, which referred to a particular date, namely where assessments had been completed on or after that date. The Supreme Court rejected the contention and held that there was no reason why pending proceeding could not be held by the legislature as a class for purpose of Art. 14.

There is no magic formula by which it can be said that one procedure is substantially more drastic and onerous than the other. It does not follow that merely because one procedure provides the forum of a civil court while the other provides the forum of an administrative tribunal, the latter is necessarily more drastic and onerous than the former.

When we are dealing with a question under Article 14, we have to enter the comparative arena for determining whether there is equal treatment of persons similarly situated so far as the procedure for determination of liability is concerned. Mere fairness of the special procedure which is impugned as discriminatory is not enough to take it out of the inhibition of Article 14.<sup>2</sup>

### 9-33. Classification under Different Laws.

When the same legislature enacts two different laws but in substance they form one legislation, it might be open to the court to disregard the form and treat them as one law, and strike it down if in their conjunction they result in discrimination. But such a course is not open where the two laws sought to be read in conjunction are by different Governments and by different legislatures. Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subject being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different Article 14 can have no application.<sup>3</sup> In *Nazaria Motor Services v. State of A. P.*<sup>4</sup> it was held that no question of discrimination could arise when taxes were imposed under two different sets of laws in different State's or geographical areas.

### 10-34. Classification in discretionary Power.

The vesting of discretion in authorities in the exercise of power under an enactment does not by itself entail contravention of Article 14. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines whatsoever with regard to the exercise of that discretion. Considering the complex nature of problems which have to be faced by a modern State, it is but inevitable that the matter of details should be left to the authorities acting under an enactment. Discretion has, therefore to be given to the authorities concerned for the exercise of the powers vested in them under an enactment. The enactment must, however, prescribe the guidelines

1. (1970) 3 SCR 253 : 1970 SC 778.

2. *Maganlal Chhaganlal (P.) Ltd. v. Municipal Corp. of Greater Bombay*, 1974 SC 2009 (2040 and 2034).

3. *State of M. P. v. Mandawar*, 1954 SCR 599 : 1954 SC 493.

4. (1969) 2 SCC 576 (581).

for the furtherance of the objects of the enactment, and it is within the framework of these guidelines that the authorities can use their discretion in the exercise of the powers conferred upon them. Discretion which is absolute uncontrolled and without any guidelines in the exercise of the powers can easily degenerate into arbitrariness. When individuals act according to their sweet will, there is bound to be an element of 'pick and choose' according to the notion of the individuals. If a Legislature bestows such untrammelled discretion on the authorities acting under an enactment, it abdicates its essential function for such discretion is bound to result in discrimination which is the negation and antithesis of the ideal of equality before law as enshrined in Article 14 of the Constitution. It is the absence of any principle or policy for the guidance of the authority concerned in the exercise of discretion which vitiates an enactment and makes it vulnerable to the attack on the ground of violation of Article 14. It is no answer to the above that the executive officers are presumed to be reasonable men who do not stand to gain in the abuse of their power and can be trusted to use 'discretion' with discretion.<sup>1</sup>

Although a law is fair on its face and impartial in appearance, yet if it is applied and administered with an evil eye and unequal hand, so as to make unjust and illegal, discrimination, it would constitute a denial of equal protection of the laws.<sup>2</sup>

In Parliamentary Supervision of Delegated Legislation by John E. Kersell, 1960 Ed. it is mentioned :

"The point is, however, that no one ought to be trusted with power without restraint. Power can be of an 'encroaching nature' and its encroachments are usually for the sake of what are sincerely believed to be good, and indeed necessary, objectives. Throughout history the most terrible form of tyranny has been the forcing on human beings of what someone believes to be good for them. The imposition of controls on the use of delegated legislative authority, therefore, does not imply a deep suspicion of malevolent intentions. Human nature being what it is, has to be protected against itself, and where power is concerned the very existence of the possibility of restraint, as we shall see, is a safeguard against abuses in which ends may be used to justify means and the good in intent becomes the evil in effect."

It has been observed by the Supreme Court in the case of *Ram Krishna Dalmia v. S. R. Tendolkar*,<sup>3</sup> that a statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the

1. *State of Punjab v. Khanchand*, 1974 SC 543 (546).

2. *Chy Lung v. Freeman* 23 L. ed. 550 ; *Bailey v. Alabama*, 55 L. ed. 191.

3. 1959 SCR 279 (299) : AIR 1958 SC 538.

delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action under such law.

In *Harishankar Bagla v. State of Madhya Pradesh*,<sup>1</sup> the Supreme Court upheld the Essential Supplies (Temporary Powers) Act, 1946. It was observed that the legislature must declare the policy of the law and the legal principles which are to control given cases and must provide a standard to guide the officials or the body in power to execute the law. This Court in that context examined the various provisions of the Essential Supplies (Temporary Powers) Act, 1946 and found that the Legislature had laid down such a principle in the Act and that the said principle was the maintenance or increase in supply of essential commodities and of securing equitable distribution and availability at fair prices. The preamble and the body of the Sections of the aforesaid Act, it was observed, sufficiently formulated the legislative policy and the ambit and the character of the Act.

In *State of Punjab v. Khan Chand*,<sup>2</sup> the legislature did not declare the policy of the law and the legal principles which governed the authorities in the exercise of the discretion vested in them under the impugned Act.

In *Sri Ram Ram Narain Medhi v. State of Bombay*,<sup>3</sup> the constitutional validity of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 was assailed. The Supreme Court on examining the provisions of the Act found that the Legislature had laid down the policy of the Act, in the preamble and enunciated the broad principles in Section 5, 6 and 7 of the Act. The Court accordingly came to the conclusion that the Act had not conferred uncontrolled power on the State Government to vary the ceiling area of the economic holding. The Court in this context observed that where the Legislature settles the policy and broad principles of the legislation, there could be no bar against leaving the matters of detail to be fixed by the executive and such delegation of power could not vitiate the enactment. This case again can be of no help to the appellants because, as would appear from the above, the Legislature has not settled the policy and broad principles of the legislation in the impugned Act in the above case.

In *P. J. Irani v. State of Madras*,<sup>4</sup> the constitutional validity of Section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949 under which exemption could be granted to a building or class of buildings from the operation of all or any provision of the Act was assailed on the ground that the said Section violated Art. 14 of the Constitution. The Court upheld the validity of that Section on the ground that enough guidance was afforded by the preamble and the operative provisions of the Act for the exercise of the discretionary power vested in the Government. It was observed that the power under Section 13 of the aforesaid Act for exempting any building or class of building was to be exercised in cases where the protection given by the Act caused hardship to the landlord or was the subject of abuse by the tenant.

1. (1955) 1 SCR 380 : AIR 1954 SC 465.

2. 1974 SC 543 : (1954) 2 SCR 768.

3. (1959) Supp (1) SCR 489 : AIR 1959 SC 459.

4. (1962) 2 SCR 169 : AIR 1961 SC 1731.

5. *State of Punjab v. Khanchand*, 1974 SC 543 (546).



It has also been observed by the Supreme Court in *Thanga Kunju Musaliar v. Venkitachalam Potti*,<sup>1</sup> "with reference to the possibility of discrimination between assesseees in the matter of the reference of their cases to the Income-tax Investigation Commission that 'it is to be presumed unless the contrary were shown, that the administration of a particular law would be done not with an evil eye and unequal hand and the selection made by the Government of the cases of persons to be referred for investigation by the Commission would not be discriminatory'".

"This presumption, however, cannot be stretched too far and cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory treatment.<sup>2</sup> There may be cases where improper execution of power will result in injustice to the parties. As has been observed, however, the possibility of such discriminatory treatment can not necessarily invalidate the legislation and where there is an abuse of such power, the parties aggrieved are not without ample remedies under the law.<sup>3</sup> What will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of the power itself".

### 10-35. *Classification in Delegated Power.*

The doctrine of a provision suffering from the vice of excessive delegation of power has been explained and discussed in several decisions of the Supreme Court. In *Anwar Ali Sarkar's* case<sup>1</sup> which may justly be regarded as the locus classicus on the subject, Fazal Ali, J., clearly observed as follows :

"Since an Act which gives uncontrolled authority to discriminate cannot but be hit by Article 14 and it will be no answer simply to say that the legislature having more or less the unlimited power to delegate has merely exercised that power. Secondly, the Act itself does not state that public interest and administrative exigencies will provide the occasion for its application. Lastly, the discrimination involved in the application of the Act is too evident to be explained away."

Mahajan, J., agreeing with the same expressed his views thus : "The present statute suggests no reasonable basis for classification, either in respect of offences or in respect of cases. It has laid down no yardstick or measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those who are outside the purview of the Special Act. The Act has left this matter entirely to the unregulated discretion of the Provincial Government."

Mukherjea, J., observed thus :

"In the case before us the language of Section 5 (1) is perfectly clear and free from any ambiguity. It vests an unrestricted discretion in the State Government to direct any cases or classes of cases to be tried by the Special Court in accordance with the procedure laid down in the Act.....I am definitely of opinion that the necessity, of a speedier trial

1. (1955) 2 SCR 1196: 1956 SC 246.

2. *Gulf, Colorado, etc. v. W. H. Ellis*, (1897) 165 US 150: 41 L ed. 666.

3. *Dinabandhu Sahu v. Jadumony Mangaraj*, (1955) 1 SCR 140 ; AIR 1954 SC 411 (414).

4. AIR 1952 SC 75.

is too vague, uncertain and elusive a criterion to form a rational basis for the discriminations made.....but the question is : how is this necessity of speedier trial to be determined? Not by reference to nature of the offences or the circumstances under which or the area in which they are committed, nor even by reference to any peculiarities or antecedents of the offenders themselves, but the selection is left to the absolute and unfettered discretion of the executive Government with nothing in the law to guide or control its action. This is not a reasonable classification at all but an arbitrary selection."

Chandrasekhar Aiyar, J., elucidated the law thus :

"If the Act does not state what exactly are the offences which in its opinion need a speedier trial and why it is so considered, a mere statement in general words of the object sought to be achieved, as we find in *Anwar Ali Sarkar's* case, is of no avail because the classification, if any, is illusive or evasive. The policy or idea behind the classification should at least be adumbrated, if not stated, so that the Court which has to decide on the constitutionality might be seized of something on which it could base its view about the propriety of the enactment from the stand point of discrimination or equal protection. Any arbitrary division or ridge will render the equal protection clause moribund or lifeless.

Apart from the absence of any reasonable or rational classification, there was the additional feature of *carte blanche* being given to the State Government to send any offences or cases for trial by a Special Court."

Bose, J., held thus :

"It is the differentiation which matters ; the singling out of cases or groups of cases or even of offences, or classes of offences, or a kind fraught with the most serious consequences to the individuals concerned, for special, and what some would regard as peculiar, treatment."

The five Judges whose decisions have been extracted constituted the majority decision of the Bench.<sup>1</sup>

In *Hari Chand Sardar v. Mizo District Council*<sup>2</sup> it was highlighted that where a Regulation did not contain any principles or standard for the exercise of the executive power, it was a bad regulation as being violative of Art. 14. In this connection, the Court<sup>3</sup> observed :

"A perusal of the Regulation shows that it nowhere provides any principles or standards on which the Executive Committee has to act in granting or refusing to grant the licence.....There being no principles or standards laid down in the Regulation there are obviously no restraints or limits within which the power of the Executive Committee to refuse to grant or renew a licence is to be exercised.....The power of refusal is thus left entirely unguided and untrammelled. A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation was one such provision and was, therefore, liable to be struck down as violative of Article 19 (1) (g)."

1. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1958) para-114.

2. (1967) 1 SCR 1012 : AIR 1967 SC 829.

3. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1958) para-115.

To the same effect is another decision of the Supreme Court in *State of Mysore v. S. R. Jayaram*,<sup>1</sup> where the following observations were made :

"The Rules are silent on the question as to how the Government is to find out the suitability of a candidate for a particular cadre.....It follows that under the latter part of Rule 9 (2) it is open to the Government to say at its sweetwill that a candidate is more suitable for a particular cadre and to deprive him of his opportunity to join the cadre for which he indicated his preference."

The Court held that the latter part of Rule 9 (2) gave the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It was thus violative of Articles 14 and 16 (1) of the Constitution and was struck down.

In *State of Mysore v. S. R. Jayaram* (supra) also the Rules were struck down because no principles or guidelines were given by the statute to determine the suitability of a particular candidate.

Regulation 46 (i) (c) provided that the Air Hostesses would retire on attaining the age of 35 years or on marriage if it took place within four years of service. The last limb of this provision relating to first pregnancy in the case of the Air Hostesses had been struck down by the Court and the remaining sub-clause (c) had to be read with Regulation 47 which provides that the services of any employee may, at the option of the Managing Director, on the employee being found medically fit, be extended by one year beyond the age of retirement, the aggregate period not exceeding two years. This provision applied to employees who retired at the age of 58. So far as the Air Hostesses are concerned, under the Regulation the discretion is to be exercised by the Managing Director to extend the period up to ten years. In other words, the spirit of the Regulation is that an Air Hostess, if medically fit, is likely to continue upto the age of 45 by yearly extensions given by the Managing Director. Unfortunately, however, the real intention of the makers of the Regulation has not been carried out because the Managing Director has been given an uncontrolled, unguided and absolute discretion to extend or not to extend the period of retirement in the case of Air Hostesses after 35 years. The words 'at the option' are wide enough to allow the Managing Director to exercise his discretion in favour of one Air Hostess and not in favour of the other which may result in discrimination. The Regulation did not provide any guidelines, rules, or principles which may govern the exercise of the discretion by the Managing Director. Similarly, there was also no provision in the Regulation requiring the authorities to give reason for refusing to extend the period of retirement of Air Hostesses. The provision did not even give any right of appeal to higher authorities against the order passed by the Managing Director. Under the provision, as it stood, the extension of the retirement of an Air Hostess was entirely at the mercy and sweetwill of the Managing Director. The conferment of such a wide and uncontrolled power on the Managing Director was clearly violative of Article 14, as the provision suffered from the vice of excessive delegation of powers.<sup>2</sup> For these reasons, therefore, the Supreme Court had no alternative but to strike down as invalid that part of Regulation 47 which gave option to the Managing Director to extend the service of an Air Hostess. The effect of striking down this provision would be that an Air Hostess, unless the provision is suitably amended to bring it in conformity with the provisions of Article 14 would continue to retire at the age of 45 years and the Managing Director would

1. (1968) 1 SCR 349 : AIR 1968 SC 346.

2. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1859) para-116.

be bound to grant yearly extensions as a matter of course, for a period of ten years if the Air Hostess was found to be medically fit. This will prevent the Managing Director from discriminating between one Air Hostess and another.<sup>1</sup>

#### 10-36. Onus to prove breach of Art. 14.

A rule cannot be struck down as discriminatory on any a priori-reasoning. Where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rule offends Art. 14 the burden is on him to plead and prove the infirmity. The burden is on the party to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts, for there is a presumption that every factor which was relevant or material had been taken into account in formulating the classification unless the classification was unjust on the face of it. As Subba Rao, C. J. said "the onus is upon the party attacking the classification to show by placing the necessary material before the Court that the said classification is unreasonable and violative of Article 14."<sup>2</sup>

Omission to furnish the necessary particulars was construed by the Supreme Court in two cases *Katra Education Society v. State of U.P.*<sup>3</sup> and *Probhudas Morarji v. Union of India*,<sup>4</sup> as indicating that the plea of unlawful discrimination had no basis. Such an infirmity in pleadings, led the Supreme Court in *State of M.P. v. Bhopal Sugar Industries*<sup>5</sup> to remand the matter.

A person relying upon the plea of unlawful discrimination which infringes a guarantee of equality before the law or equal protection of the laws must set out with sufficient particulars his plea showing that between the persons similarly circumstanced discrimination has been made which is founded on no intelligible differential. If the claimant for relief establishes similarity between persons who are subjected to a differential treatment it may be upon the State to establish that the differentiation is based on was rational object sought to be achieved by the Legislature. In *Cochin Devaswom Board v. Yamana Setti*<sup>6</sup> the court observed that Legislature or executive action may be sustained if the State satisfies the twin tests of reasonable classification.

#### 10-37. Classification in regard Land Acquisition case.

In *State of Madras v. Namasivaya*<sup>7</sup> the Supreme Court struck down the Madras Lignite (Acquisition of Land) Act. 11 of 1953 which provided that compensation for acquisition of legnite bearing lands under the Land Acquisition Act shall be assessed on the market value of the land prevailing on August 28, 1947 and not on the date on which the notification was issued under Section 4 (1) of the Land Acquisition Act. Similarly in *Jeesebhoy v. Assistant Collector*<sup>8</sup> the Supreme Court struck down as violative of Art. 14,

1. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1859) para-118.

2. *State of J. K. v. Triloki Nath*, 1974 SC 1 ; *State of U. P. v. Kartar Singh*, (1964) 6 SCR 679 (687) ; 1964 SC 1135 ; *Ram Krishna Dalmia v. Tendolkar*, 1959 SCR 279 (297) ; 1958 SC 538.

3. (1966) 3 SCR 328 (336 337) : 1966 SC 1307.

4. 1966 SC 1044 (1047).

5. (1964) 6 SCR 846 : 1964 SC 1179.

6. 1966 SC 1980 (1987).

7. (1964) SCR 936 : 1965 SC 190.

8. (1965) I SCR 636: 1965 SC 1096.

a provision made by the Land Acquisition (Bombay Amendment) Act, 1948 which enjoined the acquiring authority to assess compensation at the market rate prevailing not on the date of the issue of the notification under Section 4 of the Land Acquisition Act, but on January 1, 1948. In *Vajravelu Mudaliar v. Special Deputy Collector*,<sup>1</sup> the land could have been acquired for various schemes under the Land Acquisition Act ; after paying the market value of the land and also under the Land Acquisition (Madras Amendment) Act, 1961 at a price lower than what the State would have had to pay under the Land Acquisition Act. Holding that the Amending Act infringed Art. 14 and was void Subba Rao, J., said : "The object is to acquire lands for housing schemes at a low price. For achieving that object any land falling in any of the said categories can be acquired under the Amending Act. So, too for a public purpose any such land can be acquired under the Land Acquisition Act, we therefore hold that discrimination is writ large on the Amending Act and it cannot be sustained on the principle of reasonable classification".

### 10-38. *Classification in regard to Illegitimate Children.*

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage, but visiting this condemnation on the head of an infant is illogical and unjust moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing. Obviously no child is responsible for his birth and penalising the illegitimate child is an ineffectual as well as an unjust way of deterring the parent.<sup>2</sup>

A State may not thus exclude illegitimate children from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent.<sup>3</sup> Similarly, a State may not create a right of action in favour of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right.<sup>4</sup> Once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there will be no constitutionally sufficient justification for denying such an essential right to illegitimate children.<sup>5</sup> In *New Jersey Welfare Rights v. Cahill*<sup>6</sup> the appellant challenged that aspect of the programme that limited benefits to only those otherwise qualified families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child of both, the natural child of one and adopted by the other, or a child adopted by both. The appellant's claim of denial of equal protection was sustained. The Court said : "There can be no doubt, that the benefits extended are as indispensable to the health and well being of illegitimate children as to those who are legitimate."

1. (1965) 1 SCR 614 ; 1965 SC 1017.

2. *Weber v. Aetna Casualty & Surety Co.*, 31 L. ed 2d 768.

3. *Ibid.*

4. *Levy v. Louisiana*, 20 L. ed 2d 436.

5. *Gómez v. Perez*, 35 L. ed 2d 56.

6. 36 L. ed 2d 543.

## Prohibition of discrimination on grounds of religion race, caste, sex or place of birth

### S Y N O P S I S

- 11·1. Right to Equality not absolute.
- 11·2. Article 15.
- 11·3. Articles 14, 15 and 16 compared.
- 11·4. Discrimination on ground of Religion.
- 11·5. Residence and place of birth.
- 11·6. Discrimination on ground of sex.
- 11·7. Article 15 (4)...object of.
- 11·8. Article 15 (4) exception to Art. 15 (1).
- 11·9. Classes of citizens.
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- 11·11. Economic backwardness...Poverty test.
- 11·12. Educational...Backwardness
- 11·13. Caste...relevancy in ascertaining backwardness.
- 11·14. Reservation...Proportion.
- 11·15. Place.
- 11·16. Admission to Colleges.

#### 11·1. *Right to Equality not absolute.*

There is no guarantee of absolute equality for all citizens in all circumstances but there is guarantee of equality as human persons, related to their dignity as human beings and a guarantee against any inequalities grounded

upon an assumption or indeed a belief that some individual or individuals or classes of individuals are, by reasons of their human attributes or their ethnic or racial, social or religious background, to be treated as the inferior or superior to other individuals in the community. This list does not pretend to be complete but is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves. Further more under no possible construction of the constitutional guarantee could a body corporate or any entity but a human being be considered to be human person for the purposes of this provision.

**11.2. Article 15.**

Article 15 of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainments ; (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State for making any special provision for women and children.

(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Casts and the Scheduled Tribes.

**11.3. Articles 14, 15 and 16 compared.**

Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds—religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16 (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and clause (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. It would thus appear that, Art. 14 guarantees the general right of equality ; Arts. 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Art. 16, the latter being confined to matters relating to employment or appointment to any office under the State. It is also worthy of note that Art. 15 does not mention 'descent' as one of the prohibited grounds of discrimination, whereas Art. 16 does. There is no reason why the full ambit of the fundamental right guaranteed by Art. 16 in the matter of employment or appointment to any office under the State should be cut down by reference to the provisions in Part XIV of the Constitution which relate to services or to provisions in the earlier Constitution Acts relating to the same subject. These service provisions do not enshrine any fundamental right of citizens ; they relate to recruitment, conditions and tenure of service of persons, citizens or otherwise,

appointed to a Civil Service or to posts in connection with the affairs of the Union or any State.<sup>1</sup>

All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15 (1) and Art. 16 (2) and it means, "to make an adverse distinction with regard to ; distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different.<sup>2</sup>

#### 11.4. *Discrimination on ground of Religion.*

In *State of Rajasthan v. Pratap Singh*<sup>3</sup> by notification the government exempted the Muslims and the Harijans from liability to pay the cost of quartering of additional police to disturbed areas. The State defended the notification by saying that the Harijans and Muslims had been exempted from liability not because of their religion, race or caste but because they were found to be law abiding and peace loving. It was not their case that there were no persons belonging to the other communities who were peace loving, the notification was struck down as it discriminated against the law abiding members of the other communities and was in favour of the Muslims, and Harijan communities.

Any law providing for elections on the basis of separate electorate for members of different religious communities offends against Art. 15.<sup>4</sup>

This constitutional mandate to the State not to discriminate against any citizen on the ground, 'inter alia', of religion clearly extends to political as well as to other rights, and any election held after the Constitution in pursuance of such a law, subject to Cl. (4), must be held void as being repugnant to the Constitution.<sup>5</sup>

#### 11.5. *Residence and place of birth.*

When Art. 15 (1) prohibits discrimination based on place of birth, it cannot be read as prohibitory discrimination based on residence.

In *D. P. Joshi's*<sup>6</sup> case the State Government made a rule that no capitation fee should be charged from students who were *bona fide* residents of Madhya Bharat but capitation fee should be retained for non-Madhya Bharat students. This rule was challenged as an infraction of Articles 14 and 15 (1). The Supreme Court held that the rule did not infringe the Fundamental Right guaranteed by Article 15 (1) because residence and place of birth were two

1. *Dasarath Rama Rao v. State of A. P.*, 1961 SC 564 (569).

2. *Kathi Raning Rawat v. State of Saurashtra*, 1952 SCR 435 : 1952 SC 123 (125) ; *Air India v. Nergesh Meerza*, 1981 SC 1829 (1858).

3. 1960 SC 1208.

4. *Nain Sukh Das v. State of U. P.*, 1953 SC 384 (385).

5. *D. P. Joshi v. Madhya Bharat State*, 1955 SC 334; *State of U. P. v. Pradip Tandon*, 1975 SC 563 (569).

6. *Ibid.*



distinct conceptions with different connotations both in law and fact. The Court said that Article 15 (1) prohibited discrimination based on place of birth and the prohibition could not be read as one of discrimination based on residence. A division into two groups; viz, *bona fide* residents of Madhya Bharat and non-residents of Madhya Bharat was held not to be a violation of Article 14. A classification based on residence was held to have a fair and substantial relation to the purpose of the law. It was said that if the State had to spend money on education, it was not unreasonable that the State should order the educational system in such a manner that the advantage of it would to some extent enure for the benefit of the State.<sup>1</sup>

#### 11.6. *Discrimination on ground of sex.*

What Articles 15 (1) and 16 (2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. In *Yusuf Abdul Aziz v. State of Bombay and Husseinbhai Laljee*,<sup>2</sup> sex was held to be a permissible classification. While dealing with this aspect of the matter the Court observed thus :

“Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code.”<sup>3</sup>

The same view was taken by the Supreme Court in a later decision in *Miss C. B. Muthamma v. U. O. I.*,<sup>4</sup> where Krishna Iyer, J. speaking for the Court made the following observations :

“We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.”<sup>5</sup>

Biological differences would justify different treatment of the sexes. The prohibition of discrimination between men and women would apply only if matters to be regulated are essentially comparable, i. e. if apart from sex of person concerned, the law concerns other essential elements which are the same. Therefore, the matters concerning man and woman must have essential element in common that can be compared. The pre-requisite for application of Article 14 would be lacking common elements which do not exist at all but also if by legible differences between the sex characterise the matter under discussion so decisively that possible comparable elements are in fact completely unimportant. This provision of the equality before law can actually be realised for only one sex, e. g. in the legal sense a man can never be favoured or prejudiced by the provisions for protection of motherhood since only a woman can become a mother. These reasons would thus exclude application

1. *State of U. P. v. Pradip Tandon*, (1975) 1 SCC 267 (278) : 1975 SC 563.
2. 1954 SCR 930 : AIR 1954 SC 321 (322).
3. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1847) para-66.
4. (1979) 4 SCC 260 : AIR 1979 SC 1868.
5. *Ibid.*, quoted in *Air India v. Nergesh Meerza*, 1981 SC 1829 (1847) para-67.

of Article 14 in the area of sexual penal law for whose offences the sexual drive of the man is the Constitutional element.

Articles 175 and 175 (a) of the German Criminal Court punish homo-sexual acts between males including consenting adults but not between females. Two males convicted under these provisions alleged that these Articles were invalid because they denied equality in punishing only male homo-sexual and interfere with free dignity or personality. The West German Constitutional Court observed that the deciphered question was whether or not, because of their biological differences male and female are different matters and the Constitutional principles of equal rights for both sexes could not be applied.

Similarly very pregnant observation was made by the U. S. Supreme Court in *City of Los Angeles, Department of Water & Power v. Marie Manhart*,<sup>1</sup> thus :

"It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.....The question, therefore, is whether the existence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. The basic policy should be to require a Court to focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."<sup>2</sup>

In *Bombay Labour Union v. International Franchises Pvt. Ltd.*<sup>2</sup> the Supreme Court while dealing with a rule barring married women from working in a particular concern expressed views almost similar to the views taken by the U. S. Supreme Court in decisions referred to above. In that case a particular rule required that unmarried women were to give up service on marriage. In criticising the validity of this rule the Supreme Court observed :

"We are not impressed by these reasons for retaining a rule of this kind....Nor do we think that because the work has to be done as a team it cannot be done by married women. We also feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even unmarried women or widows are entitled to such leave as the respondent's rules provide and they would be availing themselves of these leave facilities."

Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities

1. (1978) 55 L ed 2nd 657 quoted in *Air India v. Nergesh Meerza*, 1981 SC 1829 (1855).

2. (1966) 2 SCR 493 : AIR 1966 SC 942 quoted in *Air India v. Nergesh Meerza*, 1981 SC 1829 (1853).

...on the member of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. Any distinction, made on the ground of pregnancy cannot but be held to be extremely arbitrary.<sup>1</sup>

In *General Electric Company v. Martha V. Gilbert*,<sup>2</sup> although the majority of the Judges of the U. S. Supreme Court were of the opinion that exclusion of pregnancy did not constitute any sex discrimination in violation of Title VII nor did it amount to gender-based discrimination; three Judges, namely Brennan, Marshall and Stevens, JJ. dissented from this view.

Stevens, J. while endorsing the view of Brennan, J. observed :

“The employer’s rule placed the risk of absence caused by pregnancy in a class by itself, thus violating the statute as discriminating on the basis of sex, since it was the capacity to become pregnant which primarily differentiated the female from the male.”

In the *Air India* there was a rule that if an unmarried woman conceived then her services would be terminated on first pregnancy. This Rule was challenged in *Air India v. Nargesh Meerza*.<sup>3</sup> case.

By making pregnancy a bar to continuance in service of an Air Hostesses the Corporation seems to have made an individualised approach to a woman’s physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach.<sup>4</sup>

A woman does not after bearing children becomes weak in physique or in her constitution. There is neither any legal nor medical authority for this bald proposition. Having taken the air hostess in service and after having utilised her services for four years, to terminate her services if she becomes pregnant would amount to compelling the poor air hostess, not to have any children and thus interfere with and divert the ordinary course of human nature. It is not only a callous and cruel act but an open insult to Indian womanhood—the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution.<sup>5</sup>

#### 11.7. *Article 15 (4)—Object of.*

In the case of *State of Madras v. Champakamma*<sup>6</sup> the validity of the Government order issued by the Madras Government fixing certain proportions in which students seeking for admissions to the Engineering and Medical Colleges in the State should be admitted was challenged. The order was struck down on the ground that the fundamental rights guaranteed by Articles 15 and 29 (2) were not controlled by any exception, and that since

1. *Sharron v. Eliot*, (1973) 36 L ed. 2nd 583 quoted in *Air India v. Nargesh Meerza*, 1981 SC 1829 (1852).

2. (1976) 50 L. ed. 2nd 343 quoted in *Air India v. Nargesh Meerza*, 1981 SC 1829 (1852).

3. *Air India v. Nargesh Meerza*, 1981 SC 1829 (1851).

4. 1981 SC 1829 (1850) para 90.

5. *Ibid.*, p. 1850 para 80.

6. 1951 SCR 525 : 1951 SC 226.

there was no provision under Article 15 corresponding to Article 16 (4) the impugned order could not be sustained. It was as a result of this decision that Article 15 was amended by the Constitution (First Amendment) Act, 1951 and Article 15 (4) was added :

“Nothing in this article or in clause (2) of Article 29 (2) shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”

The object of the reservation under Article 15 (4) is to recognize the factual existence of socially and educationally backward classes in our country and to make a sincere attempt to promote the welfare of the weaker sections of the community. Article 15 (4) gives effect to this principle.

The concept of backwardness in Art. 15 (4) is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Article 15 (4).<sup>1</sup>

The backwardness contemplated under this Article is both social and educational. Article 15 (4) speaks of backwardness of classes of citizens. The accent is on classes of citizens. Article 15 (4) also speaks of Scheduled Castes and Scheduled Tribes. Therefore, socially and educationally backward classes of citizens in Article 15 (4) could not be equated with caste.<sup>2</sup>

#### 11·8. Article 15 (4) exception to Art. 15 (1).

Article 15 (4) has to be read as a proviso or exception to Article 15 (1) and Article 29 (2). Article 15 (4) being in the nature of an exception, the conditions which justify the departure from Article 15 (1) must be strictly shown to exist.<sup>3</sup> In other words, if the impugned order is justified by the provisions of Article 15 (4), its validity cannot be impeached on the ground that it violates Article 15 (1) or 29 (2). The fundamental rights guaranteed by the said two provisions, do not affect the validity of the special provision which is permissible to make under Article 15 (4).<sup>4</sup>

In *Balaji's* case<sup>5</sup> it was urged that even if special provision could be made by the state under Article 15 (4), the said provision must be made not by an executive order but by legislation. This argument was held to be misconceived. As Gajendragadkar, J., said : “under Article 12, the State includes the Government and the legislature of each of the states. Besides, where the Constitution intended that a certain action should be taken by legislation and not by executive action, it has adopted suitable phraseology in that behalf. Articles 341 (2) and 342 (2) Articles 16 (3) and (5) are illustration in point. Therefore when Article 15 (4) contemplates that the state can make the special provision in question, the said provision can be made by an executive order also.

1. *Balaji, v. State of Mysore*, (1963) Supple SCR 439 : 1963 SC 649 (658).

2. *State of U. P. v. Pradip Tandon*, 1975 (1) SCC 267 (273).

3. *State of AP v. Balaram*, 1972 SC 1375 (1394), *Balaji v. State of Mysore*, (1963) 1 Sup. SCR 439 : 1963 SC 649; *Chitra Lekha v. State of Mysore*, (1964) 6 SCR 368 : 1964 SC 1823; *State of AP v. Sagar P.*, (1968) 3 SCR 595 : 1968 SC 1379.

4. *Balaji v. State of Mysore*, 1963 SC 649 (657).

5. *Ibid.*, p. 657-658.

Article 15 (4) authorises the state to make any special provision for the advancement of the Backward Classes of citizens or for the Scheduled Castes and Scheduled Tribes. The object of making a special provision is to carry out the directive principles enshrined in Article 46. Political freedom and even fundamental rights can have very little meaning or significance for the Backward classes and the Scheduled Castes and Scheduled Tribes unless the backwardness and inequality from which they suffer are immediately redressed.<sup>1</sup>

But when Article 16 (4) refers to the Special provision, it must not be ignored that the provision which is authorised to be made is Special provision, it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interest of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15 (4) authorises special provision to be made. It would be extremely unreasonable to assume that in enacting Article 15 (4) the Constitution intended to provide that where the advancement of the Backward classes or the Scheduled Castes and the Scheduled Tribes was concerned the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored.<sup>2</sup>

It is not to say that reservation should not be adopted ; reservation should and must be adopted to advance the prospects of the weaker section of the society. A special provision contemplated by Article 15 (4) like reservation contemplated by Article 16 (4) must be within reasonable limits. The interests of the weaker sections of society have to be adjusted with the interests of the community as a whole.<sup>3</sup>

#### **11-9. Classes of citizens.**

In the context in which it occurs the expression "classes of citizens" indicates a homogenous section of the people who are grouped together because of certain likenesses and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens.<sup>4</sup>

#### **11-10. Social backwardness.**

Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. Social backwardness which results from poverty, is likely to be aggravated by considerations of caste to which the poor citizens may belong ; but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.<sup>5</sup>

The occupations of citizens may also contribute to make classes of citizens socially backward. There are some occupations which are treated as inferior

1. *Balaji v. State of Mysore*, 1963 SC 649 (661).

2. *Ibid.* p. 662.

3. *Ibid.*, p. 663.

4. *State of U. P. v. Pradip Tandon*, (1975) 1 SCC 267 (274).

5. *Balaji v. State of Mysore*, 1963 SC 649 (659).

according to conventional belief and classes of citizens, who follow these occupations are to become socially backward.<sup>1</sup>

The place of habitation also plays not a minor part in determining the backwardness of a community of persons.

The Government should not act on basis that once a class is considered as a backward class, it should continue to be backward for all time. If once a class appears to have reached a stage of progress, from which it could be safely inferred that no further protection is necessary, the State will do well to review the list of backward classes.<sup>2</sup> In fact it was noticed by the Supreme Court in *Peerakaruppan v. State of Tamil Nadu*:<sup>3</sup> that candidate of backward classes had secured merely 50% of seats in the general pool, on this ground the Court did not hold that the further reservation made for the backward classes was invalid. The Government's decisions in this regard is open to Judicial review.

#### 11-11. *Economic backwardness—Poverty test.*

From an economic point of view the classes of citizens are backward when they do not make effective use of resources. When large areas of land maintain a sparse, disorderly and illiterate population whose property is small and negligible the element of social backwardness is observed. When effective territorial specialisation is not possible in the absence of means of communication and technical processes as in the hill and Uttrakhand areas of Uttar Pradesh the people are socially backward classes of citizens. Neglected opportunities and people in remote places raise walls of social backwardness of people.<sup>4</sup>

#### 11-12. *Educational backwardness.*

Educational backwardness is ascertained with reference to factors such as where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, is an illustration of educational backwardness. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions and educational aids. People in the hill and Uttrakhand areas illustrate the educationally backward classes of citizens because of lack of educational facilities keep them stagnant and they have neither meaning and values nor awareness for education.

#### 11-13. *Tests—relevancy in ascertaining backwardness.*

In *Balaji v. State of Mysore*,<sup>6</sup> it was observed that it was doubtful if the test of average student population in the last three High School Classes as appropriate in determining the educational backwardness and that it may not be necessary or proper to put the test as high. Even in respect of educational State average it was observed that the legitimate view to take would be that classes of citizens whose average is well below the State average could be treated as

1. *Balaji v. State of Mysore*, 1963 SC 649.

2. *State of AP v. Balaram*, USV, 1972 SC 1375 (1400).

3. 1971 SC 2303.

4. *State of UP v. Pradip Tandon*, (1975) 1 SCC 267 (274).

5. *Ibid.*, p. 275.

6. *Balaji v. State of Mysore*, 1963 SC 649 quoted in *State of AP v. Balaram*, USV, 1972 SC 1375 (1397).

educationally backward. But here again it was emphasised that the court does not propose to lay down any hard and fast rule as it is for the State to consider the matter and decide it in a manner which is consistent with the requirements of Art. 15 (4). These observations made by the Court in the above decisions have been misapplied by the High Court to the case. It has proceeded on the basis that it is axiomatic that the educational average of the class should not be calculated on the basis of the student population in the last three high school classes and that only those classes whose average is below the State average, that can be treated as educationally backward. The Supreme Court has only indicated the broad principles to be kept in view when making the provision under Art. 15 (4).

In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the said group of citizens. Caste cannot however be made the sole or dominant test. Social backwardness in the ultimate analysis is the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. If any classification of backward classed of citizens is based solely on the caste of the citizen it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical. The society is taking steps for the uplift of the people. In such a task groups or classes who are socially and educationally backward are helped by the society. That is the philosophy of our Constitution. It is in this context that social backwardness which results from poverty is likely to be magnified by caste considerations. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes. Social and economic considerations come into operation in solving the problem and evolving the proper criteria of determining which classes are socially and educationally backward. That is why our Constitution provided for special consideration of socially and educationally backward classes of citizens as also Scheduled Castes and Tribes. It is only by directing the society and State to offer them all facilities for social and educational uplift that the problem is solved. Income of the classes of citizens may be a relevant factor in determining their social and educational backwardness.<sup>1</sup>

The problem of determining who are socially and educationally backward classes is undoubtedly very complex. Sociological social and economic considerations come into play in solving the problem and evolving proper criteria for its determination. This is the function of the State which purports to act under Art 15 (4). The Court's jurisdiction is to decide whether the tests applied are valid. If it appears that the tests applied are proper and valid the classification of socially and educationally backward classes based on the tests will have to be consistent with the requirements of Article 15 (4). In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. It is necessary to remember that special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification is based solely on caste of the citizens, it may not be logical. Social backwardness is the result of poverty to a large extent. Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests. Article 15 (4) also speaks of

1. *Balaji, M. R. v. State of Mysore*, 1963 SC 649 (659).

**Scheduled Castes and Scheduled Tribes.** Therefore, socially backward classes of citizens in Article 15 (4) cannot be equated with castes. In *R. Chitrallekha v. State of Mysore*,<sup>1</sup> the Supreme Court had said that the classification of backward class based on economic conditions and occupations did not offend Article 15 (4).

The group of citizens to whom Art. 15 (4) applies are described as "classes of citizens" and not as "castes of citizens". A class according to the dictionary meaning shows division of society according to status, rank or caste. Therefore, as Gajendragadkar, J. said in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. It is, however, necessary to bear in mind the special provision is contemplated for classes of citizens and not individual citizen as such and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated.

In *R. Chitrallekha*<sup>2</sup> case Subba Rao, J. speaking for the majority of the Court observed : "The important factor to be noticed in Article 15 (4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and Scheduled Tribes. Though it may be suggested that the wider expression 'classes' is used in Clause (4) of Article 15 as there are communities without castes if the intention was to equate classes with castes, nothing prevented the makers of the Constitution from using the expression "backward classes or castes". The juxtaposition of the expression "backward classes" and "Scheduled Castes" in Article 15 (4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong".

Broadly stated, neither caste nor race or religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15 (4). When Article 15 (1) forbids discrimination on ground only of religion, race, caste ; caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15 (4) will stultify Article 15 (1). It is true that Article 15 (1) forbids discrimination only on the ground of religion, race, caste but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression "classes" in that case violates the rule of *expressio unius est exclusio alterius*. The social and educationally backward classes of citizens are groups other than groups based on caste.<sup>3</sup>

In *Balaji's*<sup>4</sup> case it was held that caste in relation to Hindus may be a relevant factor to consider in determining social backwardness of a group or class of citizens, but it cannot be made the sole and dominant basis in that behalf. Enumeration of persons as Backward classes on the basis solely of caste was struck down. In *State of A. P. v. Sagar*<sup>5</sup> a list prepared by the State solely on the basis of caste was struck down.

1. (1964) 6 SCR 368 : AIR 1964 SC 1823.
2. *Ibid.* p. 1839 quoted in *State of A. P. v. Sagar*, 1966 SC 1379 (1388).
3. *Balaji, MR v. State of Mysore*, 1963 SC 649 (658.)
4. 1963 SC 649 : (1963) Supple. 1 SCR 439.
5. 1968 SC 1379.



In *Triloki Nath v. State of J.K.*<sup>1</sup> the Supreme Court held that members of an entire caste or community may in the social, economic and educational scale of values, at a given time be backward and may on that account be treated as backward classes ; but that is not because they are members of a caste or community but because they formed a class. There may be instances of an entire caste or a community being socially and educationally backward for being considered to be given protection.<sup>2</sup>

There are a few decisions of the Supreme Court where the list prepared of Backward classes, on the basis of caste was accepted. In *Rajendran v. State of Madras*<sup>3</sup> Rule 5 which provided for reservation for socially and backward classes in selection of candidates for admission to the medical college was challenged on the ground that the list prepared exclusively on the basis of caste. The court accepted the explanation given by the Madras Government and held that though the list showed certain caste, members of those castes as a whole were really a class of socially and educationally backward citizens. If the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question it would be violative of Article 15 (1). But it must not be forgotten that caste is also a class of citizen and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it was socially and backward class of citizens under Article 15 (4). The above decision was quoted with approval in *State of A.P. v. Sagar*<sup>4</sup> and the principle laid down therein did not make any departure from those laid down in the previous decisions. In *Periakaruppan v. State of Tamil Nadu*,<sup>5</sup> also the Court held that though the list had been framed on the basis of caste, it did not suffer from any infirmity because the entire caste was substantially and socially and educationally backward. The list that was challenged in this case was more or less substantially the same as in *Rajendran v. State of Madras* (supra).

A similar conclusion was reached by the Supreme Court in *State of A.P. v. Bala Ram*.<sup>6</sup> The Court said : "though *prima facie* the list of Backward classes may be considered to be on the basis of caste, a closer examination will clearly show that it was only a description of the group following the particular occupations, or professions. Even the assumption that the list is based exclusively on caste, it is clear from the materials before the commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of Backward classes is warranted by Article 15 (4) "

In *State of A.P. v. Sagar*<sup>7</sup> the state failed to establish that the list prepared by it conformed to the requirements of clause (4) of Article 15. To give effect to clause (4) it must appear that the beneficiaries of the special provision were classes which were backward socially and educationally and they were other than the Scheduled Castes and Scheduled Tribes and that the provision was made for their advancement. Reservation may be adopted to advance

1. (1969) 1 SCR 103 : 1969 SC 1.
2. *State of AP v. Balaram*, 1972 SC 1375 (1397).
3. 1968 SC 1012.
4. (1968) 3 SCR 595 : 1968 SC 1379.
5. (1971) 2 SCR 430 : 1971 SC 2303.
6. 1972 SC 1375.
7. 1968 SC 1379 (1382-3).

the interests of the weaker sections of society but in doing so care must be taken to see that deserving and qualified person were not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race caste, sex, or place of birth and the backwardness being social and educational must be similar to the backwardness from which Scheduled Caste and the Scheduled Tribes suffer."

#### 11-14. Reservation—Proportion.

State Government often make special provision under Article 15 (4) mostly in regard to admission in colleges and the universities. In *Balaji's case*<sup>1</sup> the State had reserved 65% of the seats for the socially and educationally Backward classes and Scheduled Castes. This order was challenged and Gajendragadkar, J., said : "The adjustment of the competing claims is a difficult matter but if under the guise of making a special provision the State reserves practically all the seats available in all the colleges that clearly would be subverting the object of Article 15(4) speaking generally and in a broad way, a special provision should be less than 50% how much less than 50% would depend upon the relevant prevailing circumstances in each case."

In *Balaji's*<sup>2</sup> case it was held that the total reservation for Backward classes, Scheduled Castes and Scheduled Tribes should not ordinarily exceed 50% of the available seats. In *State of A. P. v. Balaram*<sup>3</sup> the total reservation was only 43%. The break up of that per college was 25%, 4% and 14%, for Backward classes, Scheduled Tribes and Scheduled Castes respectively. The question of reservation was thus within the limits mentioned in the above case.

Any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not also be missed that a caste is also a class of citizens and that a caste as such may be socially and educationally backward. If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. There is no gain-saying the fact that there are numerous castes in the country, which are socially and educationally backward and therefore a suitable provision will have to be made by the State as charged in Article 15 (4) to safeguard their interest.

In *Chitrlekha's*<sup>4</sup> case the Government of Mysore defined backward classes and directed that 30 per cent of the seats in professional and technical colleges and institutions would be reserved for them. The Mysore Government laid down that classification of socially and educationally backward classes should be on the basis of (1) economic condition, and (2) occupation. According to that order, a family whose income was Rs. 1, 200 per annum or less and persons or classes who followed occupations of agriculture petty business, inferior services, crafts or other occupations involving manual labour were defined to be socially, economically and educationally backward. The Supreme Court said that the classification of backward classes based on

1. 1963 SC 649.

2. (1963) Supp. 1 SCR 439 : 1963 SC 649.

3. 1972 SC 1397.

4. 1964 SC 1823 quoted in 1975 SC 569 para 34 : (1975) 1 SCC 278 para 34.

economic conditions and occupation did not offend Article 15 (4). The Supreme Court explained *Balaji's* case by stating that the authority concerned might take caste into consideration in ascertaining the backwardness of a group of persons but if it did not, the order would not be bad on that account if it could ascertain the backwardness of group of persons on the basis of other relevant material.

**11.16. Place.**

In *State of U. P. v. Pradip Tandon*,<sup>1</sup> 85 candidate from rural areas were selected in the general seats. One candidate from Uttarakhand area, 7 candidate from hill areas and one Scheduled Caste candidate also competed for the general seats. The candidates from hill areas, Uttarakhand division and Scheduled Castes were exceptions and their performance would not detract from the reservations for Schedule Caste, hill and Uttarakhand areas.

In *State of Uttar Pradesh v. Pradip Tandon* (supra) the Supreme Court further said :

"The reservation for rural areas could not be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. This reservation appeared to be made for the majority population of the State. Eighty percent of the population of the State cannot be a homogenous class. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India. In the instructions for reservation of seats it is provided that in the application form a candidate for reserved seats from rural areas must submit a certificate of the District Magistrate of the District to which he belonged that he was born in rural area and had a permanent home there, and is residing there or that he was born in India and his parents and guardians are still living there and earn their livelihood there. The incident of birth in rural areas is made the basic qualification. No reservation can be made on the basis of place of birth, as this would offend Art. 15".

A preference to one attached to one University in its own institutions for post graduate or technical training is not uncommon. The Government which bears the financial burden of running the Government colleges is entitled to lay down criteria for admission in its own college to and to decide the sources from which admission would be made, provided of course, such classification is not arbitrary and has rational basis and a reasonable connection with the object of the rules so long as there is no discrimination within each of such sources the validity of the rules laying down such sources cannot be challenged. The rules laid down a valid classification. Shelat, J. said : "Candidates passing through the qualifying examination held by a University form a class by themselves as distinguished from those passing through such examination from the other two Universities. Such a classification has a reasonable *nexus* with the object of the rules, namely, to cater to the needs of candidates who would naturally look to their own university to advance their training in technical studies, such as medical studies. The rules cannot justly be attacked on the ground of hostile discrimination or as being otherwise in breach of Art. 14."²

**11.17. Admission to Colleges.**

There is at Indore a Medical College known as the Mahatma Gandhi Memorial Medical College run by the State of Madhya Bharat. The petitioner

1. 1975 SC 563.

2. *Chitra Ghosh v. Union of India*, (1970) 1 SCR 413 (418) : 1970 SC 35 (38, 39).

a resident of Delhi was studying as a student in Indore Medical College. His complaint was that the rules in force in that institution discriminated in the matter of fees between students who were residents of Madhya Bharat and those who were not, and that the latter had to pay in addition to the tuition fees and charges payable by all the students a sum of Rs. 1,500 per annum as capitation fees, and that this was in contravention of Articles 14 and 15 of the Constitution. The object of the classification underlying the impugned rule was clearly to help to some extent students who were resident of Madhya Bharat in the prosecution of their studies, and it could not be disputed that it was quite a legitimate and laudable objective for a State to encourage education within the borders. Education is a State subject, and one of the Directive Principles declared in Part IV of the Constitution is that the State should make effective provisions for education within the limits of its economy. If the State had to spend money on it, is it unreasonable that it should so order the educational system that the advantage of it would to some extent at least enure for the benefit of the State? A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might, after passing out of the College, settle down as doctors and serve the needs of the locality. The Supreme Court held that the classification was based on a ground which had a reasonable relation to the subject-matter of the legislation, and was in consequence not open to attack.<sup>1</sup> It can not be laid down, as an inflexible dogma of universal application that under utterly different social and educational environs University-based grouping of candidates for specialised courses will, willy-nilly, be valid.<sup>2</sup>

In *D. N. Chanchala v. State of Mysore*,<sup>3</sup> case one of the rules made reservation for children of political sufferers and another rule provided for distribution of seats according to Universities. The reservation for children of political sufferers was upheld on the ground that such a classification had reasonable nexus with object of the rules, viz., a fair and just distribution of seats. With regard to the distribution of seats according to the universities, the rule provided that a seats in the general pool would be distributed university-wise. Seats in colleges affiliated to Karnatak University were to be allotted to persons passing from colleges affiliated to that University and seats in colleges affiliated to Bangalore and Mysore Universities were to be respectively allotted to persons passing from colleges affiliated to each such University. The rule also provided that no more than 20 per cent of the seats in the colleges affiliated to any university might in the discretion of the Selection Committee, be allotted to students passing from colleges affiliated to any other university in the State or else-where. This classification was impeached to be neither based on any intelligible differentia nor to have a rational nexus with the object of the rules.

The Supreme Court in *Chanchala's* case<sup>4</sup> held that since the universities were set up for satisfying the educational needs of different areas where they were set up and medical colleges were established in those areas, it could safely be presumed that they also were so set up to satisfy the needs for medical training of those attached to those universities. Such a basis for selection did not have a disadvantage of district-wise or unit-wise selection as any student from any part of the State could pass the qualifying examination in any of the three universities irrespective of place of birth or residence. The discretion of the selection committee to admit outsiders upto 20 per cent, of the total available seats in any of these colleges was held to advance the interest of education by drawing the best students not only in the State but also elsewhere in India.

1. *D. P. Joshi v. Madhya Bharat State*, 1955 SC 334 para, 1.

2. *State of Kerala v. Roshana*, 1977 SC 765 (773).

3. (1971) Sup. SCR 608 : 1971 SC 1762. quoted in (1975) 1 SCC 279.

4. 1971 SC 1762 quoted in *State of U. P. v. Pradip Tandon*, 1975 SC 563 (570).

## Equality of opportunity in matters of public employment

### SYNOPSIS

- 12.1. Article 16.
- 12.2. Articles 14 and 16 compared.
- 12.3. Equality in employment.
- 12.4. Object of Article 16.
- 12.5. Article 16 (1).
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  - (i) Basis of classification.
  - (ii) Educational qualification.
- 12.8. Article 16 (4).
  - (i) Purpose and object.
  - (ii) Whether exception to Article 16 (1).
  - (iii) Article 16 (4) and efficiency.
  - (iv) Backwardness.
  - (v) Scheduled Castes and Scheduled Tribes.

#### 12.1. Article 16.

Article 16 of the Constitution declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.' And that no citizens shall, on grounds only of religions, race, caste, sex, descent, place of birth, residence or any of them, be

1. *Constitution of India*, Article 16 (1).

**Ineligible for, or discriminated against in respect of, any employment or office under the State.<sup>1</sup>**

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment to an office (under the Government of, or any local or other authority within a State or Union territory, any requirement as to residence within that State or Union territory, to prior to such employment or appointment.<sup>2</sup> Nothing in this Article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not not adequately represented in the services under the State.<sup>3</sup>

Nothing in this Article shall affect the operation of any law which provides that the incumbent of any office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.<sup>4</sup>

### 12.2. Articles 14 and 16 compared.

Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. Nevertheless, our founding fathers were realists, and so did not declare the proposition of equality in its bald universality but subjected it to certain special provisions, not contradicting the soul of equality, but adapting that never-changing principle to the ever-changing social milieu. That is how Articles 15 (4) and 16 (4) have to be read together with Articles 15 (1) and 16 (1). The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination. Article 16 (4) imparts to the seemingly static equality embedded in Article 16 (1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16 (1) or as an exception to it. The same observation will hold good for the sub-articles of Article 15. Thus we have a constitutional fundamental guarantee in Articles 14 to 16.<sup>5</sup>

Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution. Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot

1. Constitution Article 16 (2).

2. Constitution Article 16 (3).

3. Constitution Article 16 (4).

4. Constitution Article 16 (5).

5. *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India*, (1981) 1 SCC 268 (270); 1981 SC 298 (310).

countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits".<sup>1</sup> From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is, also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to *mala fide* exercise of power and that is hit by Articles 14 and 16. *Mala fide* exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.<sup>2</sup>

The ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated. It is no answer to the charge of infringement of Articles 14 and 16 to say that the petitioner had no right to the post that might have some relevance to Article 311 but not to Articles 14 and 16.<sup>3</sup>

### 12.3 *Equality in employment.*

The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity.<sup>4</sup>

Equal opportunity does not mean getting the particular post for which a number of persons may have been considered. So long as the petitioner along with others under consideration, had been given his chance, it can not be said that he had not equal opportunity along with others who may have been selected in preference to him. Where the number of posts to be filled is less than the number of persons under consideration for those posts, it would be a case of many being called and few being chosen. The fact that the appointing authority made its choice in a particular way cannot be said to amount to discrimination against the petitioner.<sup>5</sup>

Article 14 ensures to every person equality before law and equal protection of the laws and Article 16 lays down that there shall be equality of

1. *E.P. Royappa v. State of Tamil Nadu*, 1974 SC 555 (583).

2. *Ibid.*, p. 583-84 para-85.

3. *Ibid.* p. 584.

4. *State of Kerala v. Thomas*, 1976 SC 490 (500); *State of Orissa v. Swamy, HN*, 1977 SC 1237 (1240); *General Manager South Railway v. Rangachari*, (1962) 2 SCR 586: 1962 SC 26.

5. *High Court Calcutta v. Amal Kumar*, 1962 SC 1704 (1711).

opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16 is only an instance or incident of the guarantee of equality enshrined in Article 14 : it gives effect to the doctrine of equality in the sphere of public employment. The concept of equal opportunity to be found in Article 16 permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension and gives expression to the ideal of equality of opportunity which is one of the great socio-economic objectives set out in the Preamble of the Constitution. The constitutional code of equality and equal opportunity, however, does not mean that the same laws must be applicable to all persons. It does not compel the State to run "all its laws in the channels of general legislation." It recognises that having regard to differences and disparities which exist among men and things, they cannot all be treated alike by the application of the same laws.<sup>1</sup> "To recognise marked differences that exist in fact is living law : to disregard practical differences and concentrate on some abstract identities is lifeless logic."<sup>2</sup> The Legislature must necessarily, if it is to be effective at all in solving the manifold problems which continually come before it, enact special legislation directed towards specific ends and limited in its application to special classes of persons or things. "Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it".

#### 12.4. *Object of Article 16.*

The concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. Indeed if this artificial interpretation is put on the scope and ambit of Article 16 it will lead to channelisation of legislation or polarisation of rules. Differences and disparities exist among men and things and they cannot be treated alike by the application of the same laws but the law has to come to terms with life and must be able to recognise the genuine differences and disparities that exist in human nature. Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification.<sup>3</sup>

#### 12.5. *Article 16 (1).*

Clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. It is important to note that the Constitution uses the words "equality of opportunity for all citizens". This inherently implies that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens.

The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.<sup>4</sup>

1. *Shujat Ali v. Union of India*, 1974 SC 1631 (1652); *State of J & K v. Khosa* TN, 1974 SC 1 (11); *Govind Dattatray v. Chief Controller*, (1967) 2 SCR 29 (33); 1967 SC 839 (841); *Jai Singhani v. Union of India*, (1967) 2 SCR 586 (597); 1967 SC 1427 (1431).

2. *Shujat Ali v. Union of India*, 1974 SC 1631 (1652); *State of J. K. v. Khosa*, 1974 SC 1 (11); *Morey v. Doud*, 354 US 457 (473).

3. *State of Kerala v. N. M. Thomas*, 1976 SC 491 (551).

4. *State of J & K v. Trilekhi Nath Khosa*, 1974 SC 1 (11).



Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in all matters means opportunity for persons substantially, within the same class. A classification of employees can therefore be made for first identifying and then distinguishing members of one class from those of another.<sup>1</sup>

Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality, will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

In *State of Jammu and Kashmir v. Tailoki Nath Khosa*, (supra) the Supreme Court said that dealing with practical exigencies a rule making authority may be guided by realities just as the legislature "is free to recognise degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest." Educational qualifications in that case were recognised as criteria for determining the validity of classification. The discrimination is not in relation to the source of recruitment unlike in *Roshan Lal's case*.<sup>2</sup>

The rule of equality within Articles 14 and 16 (1) will not be violated by a rule which will ensure equality of representation in the services for unrepresented classes after satisfying the basic needs of efficiency of administration. Article 16 (2) rules out some basis of classification including race, caste, descent, place of birth etc. Article 16 (4) clarifies and explains that classification on the basis of backwardness does not fall within Article 16 (2) and is legitimate for the purposes of Article 16 (1). If preference shall be given to a particular under-represented community other than a backward class or under-represented State in All India Service such a rule will contravene Article 16 (2). A similar rule giving preference to an under-represented backward community is valid and will not contravene Articles 14, 16 (1) and 16 (2). Article 16 (4) removes any doubt in this respect.<sup>3</sup>

The State is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not be scientifically perfect or logically complete.

Classification, the basis of educational qualification, made with a view to achieving administrative efficiency can not be said to rest on any fortuitous circumstances.<sup>4</sup> Educational qualification have been recognised by the Supreme Court as a safe criterion for determining the validity of classification. In the *State of Mysore v. Narasingh Rao*<sup>5</sup> where the cadre of Tracers was recognised into two, one constituting of Matriculate Tracer's with a higher scale of pay and the other of non-matriculいたes in a lower scale, it was held that Articles 14 and 15 did not exclude the laying down qualifications for the post in question. It was open to the Government to give preference to

1. *State of J & K v. Triloki Nath Khosa*, 1974 SC 1(11).

2. 1967 SC 1889 quoted in *State of Kerala v. N. M. Thomas*, 1976 SC 490 (499).

3. *State of Kerala v. N. M. Thomas*, 1976 SC 490 (499).

4. *State of J & K v. Triloki Nath*, (1974) 1 SCR 536 (549); 1974 SC 1,

5. (1968) 1 SCR 407; 1968 SC 349.

candidates having higher qualifications. In this case the Supreme Court held that higher educational qualifications were a relevant consideration for fixing a higher pay scale and therefore Matriculate Tracer's could be given a higher scale than non-matriculate Tracers. Though their duties were identical.

In *Ganga Ram v. Union of India*<sup>1</sup> it was observed that "the State which incurs diverse problems arising from a variety of circumstances is entitled to lay down conditions of efficiency for promotion in its different departments." In *Union of India v. Kohli, Dr (Miss.) S. B.*<sup>2</sup> as refined a classification as between an F. R. C. S. in general surgery and an F. R. C. S. in orthopedics was upheld in relation to appointment to the post of a professor of orthopedics on the ground that the classification made on the basis of a post-graduate degree in particular speciality was not without reference to the objective question as discrimination."

Logically, the Supreme Court said in *State of Jammu and Kashmir v. Union of India*<sup>3</sup> if persons recruited to a common cadre could be classified for purposes of pay on the basis of their educational qualifications, there could be no impediment in classifying them on the same basis for purposes of promotion. In this case the court held that though persons appointed directly and by promotion were integrated into one common cadre of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The rule providing that the graduates should be eligible for such promotion to the exclusion of diploma holders, it, was held, did not violate Articles 14 and 16 of the Constitution and was upheld. Distinguishing *Roshan Lal's* case<sup>4</sup> Chandrachud, J. (as then he was) said: "That case is no authority for the proposition that if direct recruits and promotes are of integrated into one class they can not be classified for purposes of promotion on a basis other than the one that they were drawn from different sources: In the instant case classification rests fairly and squarely on the consideration of educational qualifications graduates alone shall go into the higher post, no matter whether they were appointed as Assistant Engineers directly or by promotion. The discrimination therefore is not in relation to the source of recruitment as Article 16 (1) of the Constitution provides that there shall be equality of opportunity for all citizens in matters of employment or appointment to any office under the State. Matters relating to employment case not be confined only to the initial matters prior to the act of employment. That is only one of the matters relating to employment. The other matters relating to employment would inevitably be the provisions as to the salary and periodical increments thereon, terms as to leave, as to gratuity, as to pension and as to the age of superannuation.<sup>5</sup> The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension.<sup>6</sup>

Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed

1. 1970 SC 2178 (2181).

2. 1973 SC 811.

3. (1974) 1 SCR 536 (553) : 1974 SC 1.

4. (1968) 1 SCR 185 : 1976 SC 1889.

5. *General Manager v. Rangachari*, (1962) 2 SCR 586 (596) : 1962 SC 36.

6. *State of J & K v. Tyloki Nath*, 1974 SC 1 : (1974) 1 SCR 771 ; (1974) 1 SCR 548 ; *Ganga Ram v. Union of India*, 1970 SCJ 584 (586) ; *Ramesh Prasad v. State of Bihar*, 1978 SC 327 (331).

by Article 16 (1). The word in respect of any employment used in Article 16 (2) must include all matters relating to employment as specified in Article 16 (1).<sup>1</sup>

Judicial scrutiny can, therefore, extend only to the consideration whether the classification rests on a reasonable basis and whether it bears *nexus* with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the courts to substitute their own judgment for that of the legislature or the rule-making authority on the need to classify or the desirability of achieving a particular object.<sup>2</sup> "Judged from this point of view, it seems to us" said Chandrachud, J., "impossible to accept the respondents' submission that the classification of Assistant Engineers into Degree-holders rests on any unreal or unreasonable basis. The classification, according to the appellant, was made with a view to achieving administrative efficiency in the Engineering services. If this be the object, the classification is clearly correlated to it for higher educational qualifications are at least presumptive evidence of a higher mental equipment".<sup>3</sup>

Thus, from a detailed analysis and close examination of the cases of the Supreme Court the following propositions emerge<sup>4</sup> :—

(1) In considering the fundamental right of equality of opportunity a technical, pendantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc., are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport and spirit, Article 14 cannot be attracted.

(2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Article 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, Article 14 would have no application.

(5) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(6) In order to judge whether a separate category has been carved out of a class of service, the following circumstances have generally to be examined :—

1. *State of J. and K. v. Triloki Nath*, 1974 SC 1.

2. *Ibid.*, p. 11.

3. 1974 SC 1 (11).

4. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1842).

(a) the nature, the mode and the manner of recruitment of a particular category from the very start.

(b) the classifications of the particular category.

(c) the terms and conditions of service of the members of the category.

(d) the nature and character of the posts and promotional avenues.

(e) the special attributes that the particular category possess which are not to be found in other classes, and the like.<sup>1</sup>

It is difficult to lay down a rule of universal application but the circumstances mentioned above may be taken to be illustrative guidelines for determining the question.<sup>2</sup>

In *State of Jammu & Kashmir v. Tailoki Nath Khosa*,<sup>3</sup> it was clearly pointed out that equality is only for equals and even in cases of promotion Article 14 would apply only if promotional facility is denied within the same class.

In *United States v. James Griggs Rianes*,<sup>4</sup> it was held that one to whom application of statute is constitutional cannot be heard to attack the statute on the ground that impliedly if it applied to other persons it might be unconstitutional. These observations furnish a complete answer to the argument of the petitioner that Article 14 is violated in the instant case.<sup>5</sup>

Article 16 (1), both in its term and in the collocation of the words, indicates that it is confined to "employment" by the State and has reference to employment in service rather than as contractors.<sup>6</sup>

#### 12·6. Article 16 (2).

Article 16 (2) emphatically brings out in a negative form, what is guaranteed affirmatively by Article 16 (1). Discrimination is a double edged weapon ; it would operate in favour of some persons and not against others ; Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16 (1).<sup>7</sup>

By the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented, a residential qualification may, have to be prescribed, following exception in clause (3) was accordingly made.<sup>8</sup>

1. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1842) para-37.

2. *Ibid.*, para-38.

3. (1974) 1 SCR 771 : AIR 1974 SC 1.

4. (1960) 4 L ed 2d 524.

5. *Air India v. Nergesh Meerza*, 1981 SC 1829 (1941-2) para-35.

6. *Achutan v. State of Kerala*, (1959) Sup. 1 SCR 787 (791) : 1959 SC 490 (492)

7. *General Manager, S. Rly. v. Rangachari*, 1962 SC 36 (41).

8. *Narsimha Rao v. State of A. P.*, (1969) 1 SCC 839 (842).

**12.7. Article 16 (3)—Basis of classification—Educational qualification**

Nothing in this articles shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment of appointment to an office under any state specified in the First Schedule or any local or other authority with its territory, any requirement as to residence within the State prior to such employment or appointment.

This clause thus enables Parliament to make a law in a special case prescribing any requirement as to residence within a State or Union territory prior to appointment, as a condition of employment in the State or Union territory. Under Article 35 (a) this power is conferred upon Parliament but is denied to the Legislatures of the States, notwithstanding any thing in the Constitution, and under (b) any law in force immediately before the commencement of the Constitution in respect to the matter shall subject to the terms thereof and subject to such adaptations that may be made under Article 372 is to continue in force until altered or repealed or amended by Parliament.<sup>2</sup>

The Parliament passed the Public Employment (Requirement as to Residence) Act, 1957 and it was brought into force on March 21, 1959.

The legislative power to create residential qualification for employment is exclusively conferred on Parliament. Parliament can make any law which prescribes any requirement as to residence within the State or Union territory prior to employment or appointment to an office in that State or Union territory. Two questions arise firstly, whether Parliament, while prescribing the requirement, may prescribe the requirement of residence in a particular part of the State ; and, secondly, whether Parliament can delegate this function by making a declaration and leaving the details to be filled in by the rule making power of the Central or State Governments.<sup>3</sup>

The Court held that the Constitution spoke of a whole State as the venue for residential qualification and it was impossible to think that the Constituent Assembly thought of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause was an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. These words was obviously controlled by the words 'residence within the Stase or 'Union territory' which words meant what they said, neither more nor less. It followed, therefore, that Section 3 of the Andhra Pradesh Public Employment (Requirement as to Residence) Act, 1957, in so far as it related to Telangana and rule 3 of the rules under it were *ultra vires* the Constitution.<sup>4</sup>

**12.8. Article 16 (4)—Purpose and object.**

Article 14 enshrines the principle of equality before the law. Article 15 prohibits discrimination against citizens on grounds only of religion, race, caste, sex place of birth or any of them. Article 16 represents one facet of the guarantee of equality. According to this Articles, there shall be equality

1. This clause was amended by the Constitution (Seventh Amendment) Act, 1956. For the original words of the clause under any State specified in the First Schedule or any local or other authority within its territory any requirement as to residence within that State', the words from 'under the Government' to 'Union territory' were substituted.

2. *Narasimha Rao v. State of A. P.*, (1969) 1 SCC 839 (844).

3. *Ibid.*, para 6.

4. *Ibid.*, para 9.

of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen, it is further provided ; shall on grounds only of religion, race, caste, sex, *descent*, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State, Articles 14, 15 and 16 underline the importance, attached to ensuring equality of treatment. Such equality has a special significance in the matter of public employment.<sup>1</sup>

At the same time the framers of the Constitution were conscious of the backwardness of large sections of the population. It was also plain that because of their backwardness those sections of the population would not be in a position to compete with advanced section of the community who had all the advantages of affluence and better education. The fact that the doors of competition were open to them would have been a poor consolation to the members of the backward classes, because the chances of their success in the competition were far too remote on account of the inherent handicap and disadvantages from which they suffered. The result would have been that, leaving aside some exceptional cases the members of backward classes would have hardly got any representation in jobs requiring educational background. It would have been thus resulted in virtually repressing those who were already repressed. The framers of the Constitution being conscious of the above disadvantages from which backward classes were suffering enjoined upon the State in Article 46 of the Constitution to promote with special care educational and economic interests of the weaker sections of the people, in particular of the scheduled castes and scheduled tribes, and also protect them from social injustice and all forms of exploitation. To give effect to that objective in the field of public employment, a provision was made in Clause (4) of Article 16 that nothing in that article would prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, was not adequately represented in the services under the State. Under the above clause, it is permissible for the State, in case it finds the representation of any backward class of citizens in the State services to be not adequate, to make provision for the reservation of appointments or posts in favour of that backward class of citizens. The reservation of seats for the members of the backward classes was not, however, to be at the cost of efficiency. This fact was brought out in Article 335, according to which the claims of the members of the scheduled castes and the scheduled tribes shall be taken into consideration consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. In view of that it is not permissible to waive the requirement of minimum educational qualification and other standards essential for the maintenance of efficiency of service.<sup>2</sup>

It is further plain that the reservation of posts for a section of population has the effect of conferring a special benefit on that section of the population because it would enable members belonging to that section to get employment or office under the State which otherwise in the absence of reservation they could not have got. Such preferential treatment is plainly a negation of the equality of opportunity for all citizens in matters relating to employment or appointment to an office under the State. Clause (4) of Article 16 has, therefore, been construed as a proviso or exception to Clause (1) of that Article.

1. *State of Kerala v. Thomas N. M.*, 1976 SC 490 (505), Khanna, J.

2. *Ibid.*, p. 506.

3. See *The General Manager, Southern Rly. v. Rangachari*, AIR 1962 SC 36 and *T. Devadasan v. Union of India*, AIR 1964 SC 179.

Article 16 (4) contemplates reservation of appointments or posts in favour of backward classes and members of the Scheduled Castes and Tribes who are not adequately represented in the services under the State. Any such rule would not violate Article 14 merely because members of the more advanced classes would not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes or merely because such reservation was not made in every kind of service under the State. But if the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open then for a member of a more advanced class to complain that he had been denied equality by the State.<sup>1</sup>

In *Balaji v. State of Mysore*<sup>2</sup> it was held that the reservation of more than half of the seats in an educational institution for being filled from members of the backward classes was unconstitutional. It was pointed out there that what was true in regard to Article 15 (4) was equally true in regard to Article 16 (4). There can be no doubt that the constitution makers assumed, as they were entitled to do, that while making adequate reservation under Article 16 (4) care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide spread dissatisfaction amongst the employees, materially, affect efficiency. Therefore reservation made under Article 16 (4) by beyond the permissible and legitimate limit (to less than 50%) would be liable to be challenged as a fraud on the Constitution.<sup>3</sup> *Balaji's* case was accepted by the Supreme Court.

In *T. Devadasan v. Union of India*<sup>4</sup> the Rule provided that 17 1/2% of the total vacancies in a year would be reserved for being filled from amongst candidates belonging to Scheduled Castes and Tribes and if in any year suitable candidates were not available the reserved posts would be de-reserved, filled by candidates from other classes and a corresponding number of posts be carried forward to the next year. If on the subsequent year the same thing happened, the posts unfilled would be carried forward to the third year. In the third year the number of posts to be filled from amongst candidates of Scheduled Castes and Tribes would thus be 17 1/2% of the total vacancies plus the total unfilled vacancies. The Rules thus permitted a perpetual carry forward of unfilled reserved vacancies in the two years preceding the year of recruitment and provided addition to them of 17 1/2% of the total vacancies to be filled in the recruitment year. This rule was struck down by the Supreme Court, Mudholkar, J. speaking for the majority said: "The guarantee contained in Article 16 (1) is to each individual citizen and every citizen who is seeking employment to an office under the State is entitled to be afforded an opportunity for seeking, such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities."<sup>5</sup>

Article 15 (1), (2) and Article 16 (2) prohibits discrimination only on ground of race, sex etc. Now what is the meaning of these words "only on ground" etc.?

1. *T. Devadasan v. Union of India*, 1964 SC 179 (185).
2. 1963 SC 649, quoted in 1964 SC 179 (187).
3. *Ibid.*, quoted in *Devadasan v. Union of India*, 1964 SC 179 (185-6).
4. 1964 SC 179 (185).
5. *Ibid.*, p. 187.

Section 298 of the Government of India, 1935 used similar language. No subject of his Majesty domiciled in India shall on ground only of religion place of birth, descent, colour or any of them be ineligible for office under the Crown in India or be prohibited on any such ground from acquiring, holding or disposing of property or carrying on any occupation, trade or business or profession in British India.

(ii) *Whether exception to Article 16 (1).*

Subba Rao, J., in his dissenting judgment<sup>1</sup> said that the expression, nothing in this Article 16 (4) was a legislative device to express its intention in a most emphatic way that the power conferred thereunder was not limited in any way by the main provision but fell outside it. It had not really carved out an exception, but had preserved a power untrammelled by the other provisions of the Article. Article 16 (4) is not a proviso to Article 16(1) but this clause covers the whole field of Article 16(4). This observation was directly against the view taken by the Supreme Court in *Balaj's* case<sup>2</sup> a case under Article 15 (4). Krishna Iyer, J., adopted the observation of Subba Rao, J., in *Thomas's* case<sup>3</sup> but in *Karmchari Singh*<sup>4</sup> he viewed Article 16 (4) as an application or as an exception to Article 16 (1). In *State of Kerala v. Thomas*<sup>5</sup> Fazal Ali, J., agreed with Subba Rao, J., Mathew, J., also said that Article 16 (4) was capable of being interpreted as an exception to Article 16 (1) if the equality of opportunity visualised in Article 16 (1) was a sterile one, geared to the concept of numerical equality which took no account of the social, economic, educational background of the Backward classes and the members of Scheduled Castes and Scheduled Tribes. If equality of opportunity guaranteed under Article 1 meant effective material equality, then Article 16 (4) was not an exception to Article 16 (1). It was only an emphatic way of putting the extent to which equality of opportunity could be carried viz. even up to the point of making reservation.<sup>6</sup>

(iii) *Article 16 (4) and efficiency.*

The power to make reservation, which is conferred on the State, under Article 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointments or posts under Article 16 (4) the State has to take into consideration the claims of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration.<sup>7</sup>

Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward.

1. *Davadasan v. Union of India*, (1964) 4 SCR 681 : 1964 SC 179 (193) ; *State of Kerala v. Thomas*, 1976 SC 490 per Fazal Ali, J. p. 554, and per Krishna Iyer, J.

2. (1963) Suppl. 1 SCR 439 : AIR 1963 SC 649.

3. *State of Kerala v. Thomas*, 1976 SC 554 per Fazal Ali, J.; *General Manager Southern Railway v. Rangachari*, 1962 SC 36 (42) : (1962) 2 SCR 586 (599).

4. (1981) 1 SCC 268.

5. 1976 SC 554.

6. *Ibid.*, p. 519.

7. *State of Kerala v. N. M. Thomas*, 1976 SC 490 (498) ; *General Manager, S. Ry. v. Rangachari*, (1962) 2 SCR 586 : AIR 1962 SC 36.



The claims of members of backward classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and Tribes, who are said by the Supreme Court to be backward classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Article 15 (4) and 16 (4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15 (1) and 16 (1). The basic concept of equality is equality of opportunity for appointment. Preferential treatment for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reason means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the backward classes in services with due regard to administrative efficiency is permissible object and backward classes are rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality.<sup>1</sup>

(iv) *Backwardness.*

While clauses (1) and (2) guarantee equal opportunity to all citizens, clause (4) enables the State to make a provision for reservation of appointments of posts in favour of any backward classes of citizens, which in the opinion of the State is not adequately represented in the services.

The predominant concept underlying the provision is equality of opportunity in the matter of employment ; and, without detriment to the said concept, the State is enable to make reservations in favour of backward classes to give a practical content to the concept of equality. It is implicit in the articles that the doctrine of equality of opportunity shall be reconciled with that of reservation in favour of backward classes in such way a that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

It is also clear from the provisions that power conferred upon the State under Clause (4) can only be exercised in favour of backward classes of citizens : that is to say, whether a particular class of citizens are backward is an objective factor to be determined by the State. While the State has necessarily to ascertain whether a particular class of citizens are backward or not, having regard to acceptable criteria, it is not the final word on the question ; it is a justiciable issue. While ordinarily a Court may accept the decision of the State in that regard, it is open to be canvassed if that decision is based on irrelevant consideration. The power under clause (4) is also conditioned by the fact that in regard to any backward classes of citizens there is no adequate representation in the services under the State. The opinion of the State in this regard may ordinarily be accepted as final, except when it is established that there is an abuse of power.<sup>2</sup>

1. *State of Kerala v. Thomas*, 1976 SC 490 (501-2).

2. *Triloki Nath v. State of J & K*, 1967 SC 1283 (1285).

Decided cases have laid down certain tests for ascertaining whether a particular class is a backward class or not. Though the decision in *M. R. Balaji v. State of Mysore*,<sup>1</sup> turned upon Article 15 (4) of the Constitution, the principles laid down therein were applied to the facts of *Trilokinath v. State of J. K.*<sup>2</sup> and *Chhote Lal v. State*.<sup>3</sup>

In *Balaji's* case the Court held that backwardness under Article 15 (4) must be social and political and that social backwardness was in the ultimate analysis the result of poverty to a very large extent. In the context of admission to educational institutions this Court held that speaking generally in a broad way the provision for reservation should be less than 50 percent and that actual percentage should depend upon the prevailing circumstances in each case.<sup>4</sup>

In *Triloki Nath v. State of J. K.*<sup>5</sup> it was argued that the sole test of backwardness under Article 16 (4) was the inadequacy of representation in the services under the State; that is to say, however, advanced a particular class of citizens, socially and educationally, may be, if that class was not adequately represented in the services under the State, it was a backward class. This contention, if accepted, would exclude the really backward classes from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured, had taken to other avocations of life. It is, therefore, necessary to satisfy two conditions to attract clause (4) of Article 16, namely, (i) a class of citizens is backward *i. e.* socially and educationally, in the sense explained in *Balaji's* case (supra) and (ii) the said class is not adequately represented in the services under the State.

#### (v) Scheduled Castes and Scheduled Tribes.

In *Rajendron v. Union of India*<sup>6</sup> the first question to be considered was whether there was a constitutional duty or obligation imposed upon the Union Government to make reservations for Scheduled Castes and Scheduled Tribes either at the initial stage of recruitment and at the stage of promotion in the Railway Board Secretariat Service Scheme. It was said: "The relevant law on the subject is well settled. Under Article 16 of the Constitution there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Articles 14, 15 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Art. 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. To put it differently the equality of opportunity guaranteed by Art. 16 (1) means equality as between members of the same class of employees and not equality between members of separate independent classes.

The Constitution makes a classification of Scheduled Castes and Scheduled Tribes in numerous provisions and gives a mandate to the State to accord special or favoured treatment to them. Article 46 contains a Directive Principle of State Policy fundamental in the governance of the country enjoining:

1. (1963) Supp. (1) SCR 439 : AIR 1963 SC 649.
2. 1967 SC 1283.
3. 1979 p. 135.
4. 1963 SC 649.
5. 1967 SC 1283 (1286).
6. (1968) 1 SCR 721 (728-729) : AIR 1968 SC 507 (511).

ing the State to promote with special care educational and economic interests of the scheduled castes and scheduled tribes and to protect them from any social injustice and exploitation. Article 335 enjoins that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments in connection with the affairs of the Union or of States. Article 338 provides for appointment by the President of a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters relating to the safeguards provided for them under the Constitution. Article 341 enables the President by public notification to specify castes, races or tribes which shall be deemed to be Scheduled Castes in the State and the Union Territories. Article 342 contains provision for similar notification in respect of Scheduled Tribes. Article 366 (24) and (25) defines Scheduled Castes and Tribes. The classification by the impugned rule and the orders is with a view to securing adequate representation to Scheduled Castes and Scheduled Tribes in the services of the State as otherwise they would stagnate in the lowest rung of the State services.<sup>1</sup>

The point pressed before the Supreme Court was (i) that Scheduled Castes could not be a favoured class in the public services because they were, 'castes' and could not claim preference *qua* castes unless specially saved by Article 16 (4). and (ii) Article 16 (4) speaks of class, not caste and the two are different, however politically convenient the confusion may be. Article 16 (4) could not apply to promotional levels. (iii) that efficiency of administration was a constitutional consideration under Article 335 and could not be a sacrificial goat to propitiate the backward class *kali*. The impugned circulars offended against efficiency, both by fomenting frustration among the Civil Service indirectly producing inefficiency and by manning higher posts which demand higher skills with men of lower competitive caliber and less experience in service thus posting 'efficiency risks' in strategic positions violating Article 335.<sup>2</sup>

Article 341 makes it clear that a "Scheduled Caste" need not be a 'caste' in the conventional sense and, therefore, may not be a caste within the meaning of Article 15 (2) or 16 (2). Scheduled Castes become such only if the President specifies any castes, races or tribes or parts or groups within casts races or tribes for the purpose of the Constitution. So, a group or a section of a group, which need not be a caste and may even be a hotchpotch of many castes or tribes or even races, may still be a Scheduled Caste under Article 341. Likewise, races, or tribal communities or parts thereof or part or parts of groups within them may still be Scheduled Tribes (Article 342) for the purpose of the Constitution. Under this definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be. It is the socio-economic backwardness of a social bracket, not mere birth in a caste, that is decisive. Conceptual errors creep in when traditional obsessions obfuscate the vision.<sup>3</sup>

This aspect has been referred to in the *State of Kerala v. N. M. Thomas*<sup>4</sup> and dealt with at more length by Ray, C. J.

So long as employees similarly circumstanced in the same class of service are treated alike the question of hostile discrimination does not arise. The

1. *State of Kerala v. N. M. Thomas*, 1976 SC 490 (500).

2. *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, 1981 SC 298 (309): (1981) 1 SCC 246 (268).

3. *Ibid.*, p. 271.

4. (1976) 2 SCC 337 : 1976 SCC (L and S) 254, para 43 : 1976 SC 490.

quality of opportunity for purposes of seniority, promotion and like matters of employment is available only for persons who fall substantially within the same class or unit of service. The guarantee of equality is not applicable as between members of distinct and indifferent classes of service. The Constitution does not command that in all matter of employment absolute symmetry could be maintained. A wooden equality as between all classes of employees regardless of qualification, kind of jobs, nature of responsibility and performance of the employees is not intended nor is it practicable if the administration is to run. Indeed, the maintenance of such 'classless' undiscerning 'equality' where, in reality, glaring inequalities and intelligible differentia exists, will deprive the guarantee of its practical content. Broad classification with the achievement of efficiency in administration, is permissible. That is to say, the reasonable classification according to some principle to recognise intelligible inequalities or to avoid or correct inequalities is allowed, but not mini-classification which creates inequality among the similarly circumstance members of the same class or group.<sup>1</sup>

It is clear on a plain reading of clause (4) of Article 15 that the State has power to make special provision for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes.

The expression "Scheduled Castes" has a technical meaning given to it by clause (24) of Art. 366 and it means "such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution." The President in exercise of the power conferred upon him under Article 341 issued two Orders (1) the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Castes) Union Territories Order, 1951. Paras (2) and (3) of the first Order are material and they read as follows :

"Subject to the provisions of this Order, the castes, races or tribes or parts of or groups within caste or tribes specified in Parts I to XIII of the Schedule to this Order shall, in relation to the States to which these parts respectively relate, be deemed to be scheduled castes so far as regards members thereof resident in the localities specified in relation to them in those Parts of that Schedule."<sup>2</sup>

Notwithstanding anything contained in Paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste."

It is necessary to point out that there is no absolute rule applicable in all cases that whenever a member of a caste is converted from Hinduism to Christianity, he loses his membership of the caste. This question was considered by the Supreme Court in *C. M. Arumugam v. S. Rajgopal*,<sup>3</sup> and it was there pointed out that ordinarily it was true that on conversion to Christianity, a person would cease to be a member of the caste to which he belonged but that was not an invariable rule. It would depend on the structure of the caste and its rules and regulations. There are some castes, particularly on South India, where this consequence does not follow on conversion, since such castes comprise both Hindus and Christians. Whether Madiga is a

1. *E. P. Royappa v. State of Tamil Nadu*, 1974 SC 555 : (1974) 1 SLR 497; *General Manager S. Ry. v. Siddhanti*, (1974) 1 SCR 597 (603); *State of J. K. v. Triloki Nath*, (1974) 1 SLR 536: 1974 SC 1.

2. The same provision is made in the second order.

3. (1976) 1 SCC 863 : AIR 1976 SC 939.

caste which falls within this category is a debatable question. The contention of the respondent in this writ petition was that there were both Hindus and Christians in Madiga caste and even after conversion to Christianity, his parents continued to belong to Madiga caste and he was, therefore, a member of a Madiga caste right from the time of his birth, without deciding the question. The Supreme Court assumed that, on conversion to Christianity, the parents of the respondent lost their membership of Madiga caste and that the respondent was, therefore not a Madiga by birth. The question was, could the respondent become a member of Madiga caste on conversion to Hinduism? That is a question on which considerable light is thrown by the decision of this Court in *C. M. Arumugam v. S. Rajgopal* (supra).

It is not necessary that social and educational backwardness must be exactly similar in respects to that of the Scheduled Castes and Scheduled Tribes.<sup>1</sup>

Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of the term caste. In *Bhaiyalal v. Harikrishan Singh*,<sup>2</sup> the Supreme Court held that an enquiry whether the appellant there belonged to the Dohar caste which was not recognised as a Scheduled Caste and his declaration that he belonged to the Chamar caste which was a Scheduled Caste could not be permitted because of the provisions contained in Article 341. No court can come to a finding that any caste or any tribe is a Scheduled Caste or a Scheduled Tribe. Scheduled caste is a caste as notified under Article 366 (25). A notification is issued by the President under Article 341 as a result of an elaborate enquiry. The object of Article 341 is to provide protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.<sup>3</sup>

The word caste does not include Scheduled Caste. The definition of Scheduled Caste in Article 366 (24) meaning such castes, races, or tribes or parts or groups within such caste, races or tribes "as are deemed under Article 341 to be Scheduled Castes for the purpose of the constitution". This shows that it is by virtue of the notification of the President that the scheduled caste come into being. Though the members, of the Scheduled Caste are drawn from castes, races, tribes, they attain a new status by virtue of the notification.<sup>4</sup>

Mr. Justice Gupta, however, took the view that the expression 'Schedule Caste' means a number of existing social castes listed in a Schedule. Castes do not cease to be castes being put in a schedule. The special references to the Scheduled Castes and Scheduled Tribes in Article 46 does not suggest that the State should promote the economic interests of these castes and tribes at the expense of other weaker sections of the people.<sup>5</sup>

In *Sham Sunder v. Union of India*,<sup>6</sup> it was pointed out that Article 16 (1) would be attracted only if there was a breach of equality between members of the same class of employees and Article 14 did not contemplate equality between members of separate or independent classes. In this connection Bachawat, J. had said :

1. *State of AP v. Balaram*, 1972 SC 1375 (1395).

2. (1965) 2 SCR 877 : AIR 1965 SC 1557.

3. *State of Kerala v. Thomas* 1976 SC 490 (501).

4. *Ibid.* p. 519 per Mathew, J. see also observation of Krishna Iyer, J. on p. 533.

5. *Ibid.*, p. 542.

6. (1969) 1 SCR 312 : 1969 SC 212.

"For purposes of promotion, all the enquiry-cum-reservation clerks on the Northern Railway form one separate unit. Between members of this class there is no discrimination and no denial of equal opportunity in the matter of promotion. Equality of opportunity in matters of employment under Article 16 (1) means equality as between members of the same class of employees and not equality between members of separate, independent classes."<sup>1</sup>

In a recent decision of the Supreme Court in *Ramesh Prasad Singh v. State of Bihar*,<sup>2</sup> the same principle was reiterated thus: "Equality is for equals that is to say, those who are similarly circumstanced are entitled to an equal treatment but the guarantee enshrined in Articles 14 and 16 of the Constitution cannot be carried beyond the point which is well settled by a catena of decisions of this Court."

It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to *mala fide* exercise of power by the State machine. It is, therefore, no answer to the charge of infringement of Articles 14 and 16 to say that the petitioner had no right to the post of Chief Secretary but was merely officiating in that post. That might have some relevance to Article 311 but not to Articles 14 and 16.<sup>3</sup>

1. *Sham Sunder v. Union of India*, 1969 SC 212 (214) quoted in *Air India v. Nergesh Meerza*, (1981) SC 1829 (1941) para 32.

2. (1978) 1 SCR 787 : AIR 1978 SC 337 quoted in *Air India v. Nergesh Meerza*, 1981 SC 1829 (1941) para 34.

3. *E. P. Royappa v. State of Tamil Nadu*, 1974 SC 555 (584) para 86.

## Untouchability

### SYNOPSIS

#### 13.1. The Protection of Civil Rights Act, 1955

##### 13.1. *The Protection of Civil Rights Act, 1955*

The Constitution has abolished untouchability and its practice in any form has been forbidden.<sup>1</sup> The Constitution has also declared that the enforcement of any disability arising out of untouchability "shall be an offence punishable in accordance with law."<sup>2</sup>

For enlarging the scope and making the Penal Provision more stringent, the Untouchability (Offences) Act, 1955 had been comprehensively amended by the Untouchability (Offences) Amendment and Miscellaneous Provisions Act, 1976 which came into force from 19 November 1976. With this amendment, the name of the principal Act has been changed to the Protection of Civil Rights Act, 1955. The Act provides penalties for preventing a person, on the ground of untouchability, from entering a place of public worship and offering prayers or taking water from a sacred tank, well or spring. Penalties are also provided for enforcing any kind of social disability such as denying access to any shop, restaurant, public hospital or educational institution, hotel or any place of public entertainment or denying the use of any road, river, well, tank, water tap, bathing ghat, cremation ground, sanitary convenience, dharmashala, sarai, or musafirkhana or utensils kept in such institutions and hotels and restaurants. The Act prescribes penalties for enforcing occupational, professional or trade disabilities in the matter of enjoyment of any benefit under a charitable trust, in the construction or occupation of any residential premises in any locality or in the observance of any social, religious usage or ceremony.

The Act also lays down penalties for refusal to sell goods or render services to a person on the ground of untouchability, molesting, injuring or

1. *Constitution of India*, Article 17.

2. *Ibid.*

annoying a person or organising a boycott of, or taking any part in the ex-communication of a person who has exercised the rights accruing to him as a result of the abolition of untouchability.

Direct or indirect preaching of untouchability or its practice in any form or its justification, whether on historical, philosophical or religious grounds or on the ground of any tradition of the caste system or any other ground is deemed to be an offence under the Act.

Compulsion on the ground of "untouchability" to do any scavenging or sweeping or to remove any carcass or to flay any animal or to remove an umbilical cord or to do any other job of a similar nature, is deemed to be an enforcement of a disability arising out of untouchability and is an offence under the Act.

Offences under the Protection of Civil Rights Act, 1955 are cognizable as well as non-compoundable.

Incitement or abetment of untouchability offence has been treated in the same manner as the commission of the offence. Moreover, a public servant who wilfully neglects the investigation of any offence punishable under the Act, is deemed to have abetted an offence under the Act. The State governments are empowered to impose effective fines on the inhabitants of any areas where such people are involved in or abetting the commission of untouchability offences.



## Protection in respect of conviction for offences

### SYNOPSIS

- 14·1. Expost facto laws.
- 14·2. Law in force...Meaning.
- 14·3. Scope of Article 20 (1)...Convicted of an offence.
- 14·4. Forms of Punishment.
- 14·5. What is not prohibited by Article 20.
- 14·6. Extent of Prohibition.
- 14·7. Offence...meaning of.
- 14·8. Double jeopardy.
- 14·9. Autre fois.
- 14·10. Scope and ambit of the guarantee.
- 14·11. Both prosecution and punishment necessary.
- 14·12. Protection against conviction for same offence.
- 14·13. Guarantee only against same offence.
- 14·14. Issue Estoppel.
- 14·15. Prosecution and conviction.
- 14·16. Accused presumed innocent.
- 14·17. Article 20 (3) and section 161 Cr. P.C.
- 14·18. Accused of any offence.
- 14·19. Any Person.
- 14·20. What is protected by the guarantee.
- 14·21. Self incrimination.
- 14·22. Compulsion under Article 20 (3).
- 14·23. Compelled testimony.

14.24. Third person may be incriminated...no protection under article.

14.25. Summoning of documents...specimen handwriting, thumb impression etc. of accused and Article 20 (3).

14.26. Search and seizure and Article 20 (3).

#### 14.1. *Expost facto* laws.

The legislature may enjoin, permit, forbid and punish ; it may declare new crimes and establish rules of conduct for all its citizens in future cases ; it may command what is right and prohibit what is wrong ; but it cannot change innocence into guilt or punish innocence as a crime by enacting an *expost facto* law.

*Expost facto* laws did not confirm irregular acts but voided and punished what had been lawful when done. Blackstone described laws *expost facto* as those by which "after an action indifferent in itself is committed, the legislature then for the first time declares it to have been a crime and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterward converted into guilty by a subsequent law, he had therefore no cause to abstain from it, and all punishment for not abstaining, must of consequence be cruel and unjust."<sup>1</sup> The historic page abundantly evinces that the power of passing such laws should be withheld from legislators, as it is a dangerous instrument in the hands of bold, unprincipled, aspiring and party-men and has been too often used to effectuate the most detestable purposes.

The American Constitution clearly forbids the making of an *expost facto* law. The prohibition against making any *expost facto* law was introduced there for greater caution and the necessity very probably arose from the knowledge that Parliament of Great Britain had claimed and exercised a power to pass such laws under the denomination of Bills of Attainder or Bills of Pains and Penalties, the first inflicting capital and the other lesser punishment. *Expost facto* laws within the words and the intent of the prohibition are : (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminals ; and punishes such action ; (2) Every law that aggravates a crime, or makes it greater that it was, when committed ; (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed ; (4) Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence. in order to convict the offender.<sup>2</sup>

The words *expost facto* laws are technical expression and meant every law that made an act done before the passing of the law and which was innocent when done, criminal ; or which aggravated a crime and made it greater than it was when committed ; or which changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed.<sup>3</sup>

Any law *expost facto* that mollifies the rigor of the criminal law, but only those that create or aggravates the crime or increases the punishment is not prohibited. There is a great and apparent difference between making an unlawful act, lawful and the making of innocent action criminal and punishing it as crime.<sup>4</sup>

1. Blackstone Commentaries, Vol. 1, p. 6.

2. *Calder et Wife v. Bull et Wife*, (1798) 1 L ed. 648 (650).

3. Kent ; *Commentaries* Xth ed. Vol. I page 458 ; *Phillips v. Eyre*, 28 Law Journal Q. B. 28 ; *Calder v. Bull*, 1 L ed. 648 ; *Ratan Lal v. State of Punjab*, (1964) 7 SCR 676 : 1965 SC 444.

4. *Calder v. Bull*, 1 L ed. 648 (651); *Ratan Lal v. State of Punjab*, 1965 SC 444.

A language of Article 1, section 1, 9 (3) of the American Constitution is different in some respect from the Art. 20 of our Constitution and, therefore, the American cases are not very material in interpreting our Article in the Constitution.

Article 20 (1) of the Constitution deals with *expostfacto* laws though that expression has not been used in the Article.

#### 14.2. Law in force—Meaning.

The Constitution guarantees that “No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.”<sup>1</sup>

The phrase law in force must be understood in the natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law “deemed to be retrospective by virtue of the power of the legislature to pass retrospective laws.”<sup>2</sup>

The prohibition contained in this Article is not confined in its operation to post constitution laws but also applies to *ex-post facto* laws passed before the Constitution in their application to pending proceedings.<sup>3</sup>

Usually, a law prescribes a rule of conduct by which persons ought to be governed in respect of their civil rights. Certain penalties are also imposed under the criminal law for breach of any law. Though a legislature has power to legislate retrospectively, creation of an offence for an act which at the time of its commission was not an offence or imposition of a penalty greater than that which was under the law provided violates Articles 20 (1) of the Constitution.<sup>4</sup> It is settled that any statute which punishes as a crime an act previously committed, which was innocent when done : which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defence available according to law at the time when the act was committed is prohibited as *ex-post facto*. It is axiomatic that for a law to be *ex-post facto* it must be more onerous than the prior law.

#### 14.3. Scope of Article 20 (1).—Convicted of an offence

All that Article 20 (1) prohibits to *ex-post facto* laws and is designed to prevent a person being punished for an act or commission which was considered innocent when done. It only prohibits the conviction of a person of his being subjected to a penalty under *ex-post facto* laws. In *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*,<sup>5</sup> the Supreme Court pointed out that “What is prohibited under Article 20 (1) is only conviction or sentence under an *ex-post facto* law and not the trial thereof. A trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot

1. Constitution Article 20 (1).

2. *Shiva Bahadur Singh v. State of V.P.* 1953 SC 394 (399).

3. *Shiva Bahadur Singh v. State of Vindhya Pradesh*, 1953 SC 394: 1953 SCR 1188. *State of West Bengal v. Ghosh S. K.* 1963 SC 253 (263).

4. *Nayy r, G. P. v. State Delhi Admn.*, 1979 SC 593 (600).

5. *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, 1953 SCR 1188 : AIR 1953 SC 394.

*ex-post facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved." Thus a person cannot object to a procedure different from what obtained at the time of the commission of the offence.<sup>1</sup> There is no principles underlying Article 20 which makes a right to any course of procedure a vested right.<sup>2</sup>

#### 14.4. Forms of Punishment.

Punishment may take different forms. But whatever the form, the punishment is always related to a law of the state forbidding the doing or the omission to do some thing. Unless such a law exists, there is no question of any act or omission being made "punishable".<sup>3</sup> In providing retrospectively for a charge to be made for the unauthorised use of canal water, at rates that may be prescribed by Rules, the Legislature does not prohibit the use of water. The word "unauthorised" use "does not support any idea of prohibition."<sup>4</sup> For failure to discharge liability to pay compensation a person may be imprisoned under the statute providing for recovery of the amount, but failure to discharge a civil liability is not unless the statute expressly so provides, an offence.<sup>5</sup>

#### 14.5. What is not prohibited by Article 20.

The inhibition upon the passage of *ex-post facto* laws does not give a criminal a right to be tried in all respects, by the law in force when the crime charged was committed. The constitution does not limit the legislative control of remedies and modes of procedure which do not affect matters of substance. Even though it may work to the disadvantage of an accused a procedural change is not *ex-post facto*.<sup>6</sup>

#### 14.6. Extent of Prohibition.

A statute may prohibit or command an act and in either case, disobedience thereof will amount to contravention of the statute. If the statute fixes criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of its enactment the protection of Art. 20 (1) may be attracted. But Section 25 FFF (1) of the Industrial Disputes Act, 1947 imposes neither a prohibition nor a command. Under Section 25F, there is a distinct prohibition against an employer against retrenching employees without fulfilling certain conditions. Similar prohibitions are found in Sections 22 and 23 of the Act. If this prohibition is infringed, evidently, criminal liability may arise. But there being no prohibition against closure of business without payment of compensation, Section 31 (2) does not apply. By Section 33 (c), liability to pay compensation may be enforced by coercive process, but that again does not amount to infringement of Art. 20 (1) of the Constitution. Undoubtedly for failure to discharge liability to pay compensation, a person may be imple-

1. *Nayyar, G. P. v. State of Delhi Adm.*, 1979 SC 602 (608).

2. *Union of India v. Sukumar*, 1966 SC 1206 (1209).

3. *Jawala Ram v. State of Pepsu*, 1962 SC 1246 (1248).

4. *Ibid.*

5. *Hathisingh Mfg. Co. Ltd. v. Union of India*, 1960 SC 923.

6. *Dobbert v. Florida*, 53 L. ed 2d 347 (356).

soned, under the statute providing for recovery of the amount e.g., the Bombay Land Revenue Code, but failure to discharge a civil liability is not, unless the statute expressly so provides, an offence. The protection of Art. 20 (1) avails only against punishment for an act which is treated as an offence, which when done was not an offence.<sup>1</sup>

The only protection that Art. 20 (3) gives to him is that he can not be compelled to be a witness against himself. But this does not mean that he need not give information regarding matters which do not tend to incriminate him. The Supreme Court observed in *State of Bombay v. Kathi Kalu Ogha*<sup>2</sup> as follows "In order that a testimony by an accused person may be said to have been self-incriminatory the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."

"To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification.<sup>3</sup>

The giving of finger impression or of specimen signature or of handwriting, strictly speaking is not "to be a witness." "To be a witness" means imparting knowledge in respect of relevant facts by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy.<sup>4</sup>

#### 14.7. Offence—meaning of.

The word "offence means an act or omission made punishable by any law for the time being in force. Punishment is the mode by which the State enforces its laws forbidding the doing of some thing or omission to do some thing.

#### 14.8. Double jeopardy.

"(2) No person shall be prosecuted and punished for the same offence more than once".

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. It is enshrined in Article 20 (2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. Its origins can be traced to Greek and Roman times and it became established in the common law of England.<sup>5</sup> As with many other elements of the common law, it was carried into the jurisprudence of the United States

1. *Hathi Singh Mfg. Co. v. Union of India*, 1960 SC 923 (932).

2. (1962) 3 SCR 10 (32) : 1961 SC 1806 ; *Ramanlal Bhogilal Shah v. Guha D. K.*, 1973 SC 1196.

3. *State of Bombay v. Kathi Kalu Ogha*, 1961 SC 1801 (1814).

4. *Ibid.*, 1814.

5. *Bartkus v. Illinois*, 359 US 121 (151-155) : 32 L ed. 2d 634 (705-707).

through the medium of Blackstone, who codified the doctrine in his *Commentaries*. "The plea of autre fois acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." As the American Supreme Court put it in *Green v. United States*,<sup>1</sup> the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." The Double Jeopardy Clause (Article 22) in the American Constitution protects a person in a criminal proceeding against multiple punishments or repeated prosecutions for the same offence.<sup>2</sup>

#### 14-9. *Autre fois.*

For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word "offence" embraces both facts which constitute the crime and the legal characteristics which makes it an offence. For the doctrine to apply it must be the same offence both in fact and in law.<sup>3</sup>

#### 14-10. *Scope and ambit of the guarantee*

The ambit and contents of the guarantee, are much narrower than those of the Common Law rule in England or the doctrine of "Double Jeopardy" in the American Constitution. Article 20 (2) of our Constitution, it is to be noted, does not contain the principle of "*autrefois acquit*" at all. Our Constitution makers did not think it necessary to raise one part of the Common Law rule to the level of a fundamental right and thus make it immune from Legislative interference. This has been left to be regulated by the general law of the land.<sup>4</sup>

#### 14-11. *Both prosecution and punishment necessary.*

In order to enable a citizen to invoke the protection of clause (2) of Article 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words "prosecuted and punished" are to be taken not distributively so as to mean prosecuted 'or' punished. Both the factors must co-exist in order that the operation of the clause may be attracted. The position is also different under the American Constitution. There the prohibition is not against a second punishment but against the peril in which a person may be placed by reason of a valid indictment being presented against him, before a competent Court, followed by proper arrangement and plea and a lawful impanelling of the jury. It is not necessary to have a verdict at all.<sup>5</sup>

1. 355 US 184 (187-188) : 2 L ed 2d 199 (204).

2. *United States v. Dinitz* 47 L ed. 2d. 267 (273).

3. *Connelly v. Director Public Prosecutions*, (1964) 2 All ER 401 (433) per Lord Devlin 1964 AC 1254 (1339-40).

4. *Venkataraman v. Union of India*, 1954 SC 375 (377) : 1954 SCR 11500.

5. *Willis on Constitutional Law*, p. 528.

It was held by the Supreme Court in '*Maqbool Hussain's*<sup>1</sup> case that the language of Article 20 and the words actually used in it affords a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding, before a court of law or judicial tribunal, and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but which is not required by law to try a matter judicially and on legal evidence. In that case the proceedings were taken under the Sea Customs Act before a Customs authority who ordered confiscation of goods. It was held that such proceedings were not "prosecution", nor the order of confiscation a 'punishment' within the meaning of Article 20 (2) inasmuch as the Customs authority was not a court or a judicial tribunal and merely exercised administrative powers vested in him for revenue purposes.<sup>2</sup>

It may be pointed out that the words "prosecution" and "punishment" have no fixed connotation and they are susceptible of both a wider and a narrower meaning ; but in Article 20 (2) both these words have been used with reference to an "offence" and the word "offence" has to be taken in the sense in which it is used in the General Clauses Act as meaning "an act or omission made punishable by any law for the time being in force." It follows that prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes.<sup>3</sup>

The acts alleged to have been committed by the petitioner in the *Venkataraman's* case and on the basis of which the charges had been framed against him did not come within the definition of 'offences' described in Section 161 and 165 of the Indian Penal Code and Section 5 (2) of the Prevention of Corruption Act. The Public Servants (Inquiries) Act does not itself create any offence nor does it provide any punishment for it. Rule 49 of the Civil Services Rules merely speaks of imposing certain penalties upon public servants for good and sufficient reasons. The rule does not mention any particular offence and obviously can create none. It is to enable the Government to come to the conclusion as to whether good and sufficient reasons exist, within the meaning of Rule 49 of Civil Services Rules for imposing the penalties of removal, dismissal or reduction in rank upon a public servant that an enquiry may be directed under Act 37 of 1850. A Commissioner appointed under the Public Service Enquiries Act, 1850 has no duty to investigate any offence which was punishable under the Indian Penal Code or the Prevention of Corruption Act and he had absolutely no jurisdiction to do so. The subject-matter of investigation by him was the truth or otherwise of the imputation of misbehaviour made against a public servant and it was only as instances of misbehaviour that the several articles of charge were investigated, upon which disciplinary action might be taken by the Government if it so chooses. The mere fact that the word "prosecution" had been used, would not make the proceeding before the Commissioner, one for prosecution of an offence.

The Commissioner has to form his opinion upon legal evidence, he had been given the power to summon witnesses, administer oath to them and also to compel production of relevant documents. These may be some of the trappings of a judicial tribunal, but they could not make the proceedings anything more than a mere fact finding enquiry. At the close of the enquiry, the Commissioner had to submit a report to the Government regarding his finding on each one of the charges made. This was a

1. AIR 1953 SC 325.

2. *Venkataraman v. Union of India*, 1954 SC 375 (377).

3. *Ibid.*, 379.

mere expression of opinion and it lacks both finality and authoritativeness which are the essential tests of a judicial pronouncement". The opinion was not even binding on the Government. Under Section 22 of the Act, the Government can, after receipt of the report, call upon the Commissioner to take further evidence or give further explanation of his opinion. When Special Commissioners are appointed, their report could be referred to the court or other authority to which the officer concerned is subordinate for further advice and after taking the opinion of the different authorities and persons, the Government has to decide finally what action it should take.<sup>1</sup> In an enquiry under the Public Servants (Inquiries) Act of 1850, there is neither any question of investigating an offence in the sense of an act or omission punishable by any law for the time being in force, nor is there any question or imposing punishment prescribed by the law which makes that act or omission an offence."<sup>2</sup>

#### 14.12. *Protection against conviction for same offence.*

Article 20 (2) protects against a second prosecution for the same offence after acquittal. It protects against a second prosecution for the same offence after conviction.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one is whether each provision requires proof of a fact which the other does not.<sup>3</sup> The test emphasises the elements of two crimes. If each requires proof of a fact that the other does not, the test is satisfied notwithstanding a substantial overtact in the proof offered to establish the crime.<sup>4</sup>

#### 14.13. *Guarantee only against same offence.*

Article 20 (2) protects a person from being prosecuted and punished for the same offence more than once. In this connection we may refer to Section 26 of the General Clauses Act which is referred to in Section 403 of the Criminal Procedure Code. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

As was pointed out by the Supreme Court in *State of Bombay v. S. L. Apte*,<sup>5</sup> both in the case of Article 20 (2) of the Constitution as well as Section 26 of the General Clauses Act to operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence" i. e., an offence whose ingredients are the same. The 5th Amendment of the American Constitution which provides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb, proceeds on the same principle.

The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy preceeds the commission of the crime and is complete before the crime is attempted, equally the crime attempted or completed does not require the element of

1. *Venkataraman v. Union of India*, 1954 SC 375 (379).

2. *Ibid.*

3. *Blockburger v. United States*, 76 L ed. 306.

4. *Iannelli v. US*, 43 L ed 2d 616.

5. (1961) 3 SCR 107 : AIR 1961 SC 578.



conspiracy as one of its requirements. They are therefore quite different offences.

The whole basis of Section 403 (1) of the Criminal Procedure Code is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal. If the Court was not so competent, as for example where the required sanction for the prosecution was not obtained, it was irrelevant that it was competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained.<sup>1</sup> So was the decision of the Supreme Court in *Buddhmal v State of Delhi*.<sup>2</sup> There it was said that : "Section 403, Criminal Procedure Code, applies to cases where the acquittal order has been made by a Court of competent jurisdiction but it does not bar a retrial of the accused in cases, where such an order has been made by a Court which had no jurisdiction to take cognizance of the case". One can not be said to be prosecuted and punished for the same offence when the earlier proceedings were null and void.<sup>3</sup>

The fundamental right which is guaranteed in Article 20(2) of the Constitution that no person shall be prosecuted and punished for the same offence more than once enunciates the principle of *autrefois* convict or "double jeopardy".<sup>4</sup> The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence."<sup>5</sup> To the same effect is the ancient maxim "*Nemo Bis Debat Puniri Pro Uno Delicto*", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "*Pro Eadem Causa*" that is for the same cause.

"The numerous authorities marshalled by my noble and learned friend Lord Morris of Borth-Y-Gest", said Lord Reed "show that many generations of judges have seen nothing unfair in holding that the plea of *autrefois* acquit must be given a limited scope. It may not be possible to reconcile all the decisions, but I cannot disregard the fact that with certain exceptions it has been held proper in a very large number of cases to try a man a second time on the same criminal conduct where the offence charged is different from that charged at the first trial. Distinctions between cases where a man can be tried a second time and where he cannot may seem technical, but they seem to me to be so well established by authority that it would be wrong to disregard or overrule them, even if I desired to do so".<sup>6</sup>

The plea of *autrefois* convict or of *autrefois* acquit avers respectively that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. If shown to be well-founded, such a plea operates as a bar to the indictment, since a person cannot be tried for an offence of which he has been previously convicted or acquitted or for an offence of which he could have been convicted on some previous indictment.

The burden of proving the pleas of *autrefois* convict or *autrefois* acquit is upon the defendant. He must establish that judgment of conviction or acquit-

1. *Yassofalli Mulla v. The King*, 1949 FC 264 ; *Basdeo Agarwala v. Emperor*, 1945 FC 16.
2. Criminal App. 17 of 1952 dt. 8-10-52.
3. *Baijnath Pd. v. State of Bhopal*, 1957 SC 494 (496).
4. *Maqbool Hussain v. State of Bombay*, 1953 SC 324 (328).
5. Per Charles J. in *Reg. v. Miles*, (1890) 24 QBD 423 quoted in 1953 SC 324 (328).
6. *Connelly v. DPP*, (1964) 2 All. ER 401 (406).

tal has been legally given. If, by reason of any defect in the indictment or process he was not legally liable on the first proceeding to suffer judgment for the offence then charged he cannot set up such proceeding as a bar to a subsequent indictment.

The defendant can only succeed on a plea of *autrefois convict* or *autrefois acquit* if the charge to which he pleads is one in respect of which he could have been legally convicted on the prior occasion or is one in respect of which by statute previous proceedings for the same cause are a bar to subsequent proceedings.<sup>1</sup>

This principle found recognition in Section 26 of the General Clauses Act, 1897 : "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of these enactments but shall not be liable to be punished twice for the same offence," and also in Section 403 (1), Criminal Procedure Code, 1898.

A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section-236, or for which he might have been convicted under Section 237.

The Fifth Amendment of the American Constitution enunciated this principle in the manner following "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; not shall be compelled, in any criminal case, to be witness against himself."

These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "*autrefois convict*" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.<sup>2</sup>

#### 14.14. Issue Estoppel

In *Assistant Customs Officer v. Melwan*:<sup>3</sup> the Supreme Court observed that issue estoppel rule was but a facet of the doctrine of *autrefois acquit*. They relied on the observation of Lord Mac Dermott in *Sambasivan v. Public Prosecutor*.<sup>4</sup>

#### 14.15. Prosecution and conviction.

The words "before a Court of law or judicial tribunal" are not to be found in Article 20 (2). But it is clear that in order that the protection of Article 20 (2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even

1. Halsbury's : *Laws of England*, 4th Edn. Vol. II, 146-148.

2. *Maqbool Hussain v. State of Bombay* 1953 SC 325 (328).

3. 1970 SC 962 (964)

4. 1950 AC 458 (479).

though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein : "convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "be subjected to penalty", "commission of the offence", "prosecuted and punished", "accused of any offence", would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.<sup>1</sup>

The tests of a judicial tribunal were laid down by the Supreme Court in *Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi*,<sup>2</sup> in the following passage quoted with approval by Mahajan and Makherjea, JJ. from *Cooper v. Wilson*.<sup>3</sup>

"A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites : (1) The presentation (not necessarily orally) of their case by the parties to the dispute ; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence ; (3) If the dispute between them is a question of law, the submission of legal argument by the parties, and (4) A decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

The Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. It, therefore, follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Customs Authorities constitute a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea Customs Authorities to have been "prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay in the complaint which was filed against him under Section 23, Foreign Exchange Regulation Act.<sup>4</sup>

No person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor subjected to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.<sup>5</sup>

In *State of Maharashtra v. Ramaswamy*<sup>6</sup> as there was no law in force at the time when the accused, a Government servant, was found in possession of

1. *Maqbool Hussain v. State of Bombay*, 1953 SC 325 (328).

2. AIR 1950 SC 188.

3. (1937) 2 KB 309 (340).

4. *Maqbool Hussain v. State of Bombay*, 1953 SC 325 (330).

5. *Constitution of India*, Article 20 (1).

6. 1977 SC 2091.

disproportionate assets under which his possession could be said to constitute an offence, he was held entitled to the protection of clause (1) Art. 20.

The Constitution prohibits the subjecting of any person to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Penalty under section 277 of Income Tax Act, 1961 being greater than the one engrafted in section 52 of the 1922 Act cannot therefore be imposed.<sup>1</sup>

#### 14.16. *Accused presumed to be innocent.*

‘It may be that most people formally charged with crime are guilty : yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and therefore probably guilty. Such inference may be inevitable. Jeremy Bentham wrote more than 150 years ago : “Between delinquency on the one hand, and silence under enquiry on the other, there is a manifest connection ; a connection too natural not to be constant and inseparable”.<sup>2</sup> What inference does a plea of this privilege support ? The layman’s natural just suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.’<sup>3</sup>

Article 20 (3) of our Constitution forbids the Courts to draw that inference. The presumption of innocence and the protection afforded by the Constitution requires the prosecutor to affirmatively prove that the accused is guilty beyond a reasonable doubt without the aid of his testimony.

Article 20 (3) is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials. The Constitution gives the accused and his lawyer the absolute right to decide that he shall not become a witness against himself. It forbids either comment by the prosecution on the accused’s silence or instructions by the court to the jury that such silence is evidence of guilt. Such adverse comment would amount to a penalty imposed by Courts for exercising a constitutional privilege.

Article 20 (3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station.<sup>4</sup>

In *Miranda v. Arizona*,<sup>5</sup> the U. S. Supreme Court said of the interests protected by the privileges. “All these policies point to one overriding thought the constitutional foundation underlying the privilege is the respect a Government—State or federal—must accord to the dignity and integrity of its citizens. To maintain a ‘fair state individual balance,’ to require the Government ‘to shoulder the entire load’...to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”

1. *Kanhaya Lal v. Comm. Income Tax*, 1975 SC 902.

2. J. Bentham *Rationale of Judicial Evidence* (1927) p. 209.

3. Wigmore on Evidence Ss. 2271 p. 426.

4. *Nandini Satpathy v. Danl*, (1978) 2 SCC 424 (442).

5. 16 L ed 2d 694 (715).

After tracing the English and American developments in the law against self-incrimination, Jagannadhadas, J. in *M. P. Sharma's*<sup>1</sup> case, observed : "Since the time when the principle of protection against self-incrimination became established in English law and in other systems of law which have followed it, there has been considerable debate as to the utility thereof and serious doubts were, held in some quarters that this principle has a tendency to defeat justice. In support of the principle it is claimed that the protection of accused against self-incrimination promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confessions on unverified suspicion. On the other hand, the opinion has been strongly held in some quarters that this rule has an undesirable effect on social interests and that in the detection of crime, the State is confronted with overwhelming difficulties as a result of this privilege. It is said that this has become a hiding place of crime and has outlived its usefulness and that the rights of accused persons are amply protected without this privilege and that no innocent person is in need of it. In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention."

No person accused of any offence shall be compelled to be a witness against himself. Only a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in his prosecution, would fall within the ambit of the words "accused of any offence".<sup>2</sup>

Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence<sup>3</sup>. In *R. C. Mehta v. State of West Bengal*<sup>4</sup> one of the contentions raised was, that a person against whom an enquiry under Sect. 171-A of the Sea Customs Act was made was a person accused of an offence and on that account he could not be compelled to be a witness against himself and the statement obtained or evidence collected under the aforesaid provision by the officer of Customs was inadmissible. This contention was repelled and Shah, J. said :

"The expression 'any person' includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he was found in possession of smuggled goods or on suspicion that he was concerned in smuggling was not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20 (3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected of infringing the provisions of the Sea Customs Act with the commission of any offence. His primary duty

1. 1954 SC (300 303) see Wigmore on Evidence.

2. *Veera Ibrahim v. State of Maharashtra*, 1976 SC 1167 (1169).

3. *Ibid.*, p. 1169.

4. 1970 SC 940 (945) quoted in 1976 SC 1167 (1169).

is to prevent smuggling and to recover duties of customs : when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act he is not accusing the person of any offence punishable at a trial before a Magistrate".<sup>1</sup>

In *Bansilal's* case<sup>2</sup> the Supreme Court observed : "Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Article 20 (3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important." In this case the admissibility of a statement made before an inspector appointed by the Government of India under the Indian Companies Act, 1923, to investigate the affairs of a company and to report thereon was canvassed. It was observed : "One of the essential conditions for invoking the constitutional guarantee enshrined in Article 20 (3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who was being compelled to give evidence against himself". Further observations in *Bansilal's* case make it out that in an inquiry undertaken by an inspector to investigate into the affairs of a company, the statement of a person not yet an accused, is not hit by Article 20 (3). Such a general enquiry has no specific accusation before it and, therefore, no specific accused whose guilt is to be investigated. Therefore, Article 20 (3) stands excluded.

Sinha, C.J., speaking for the majority of the Court in *Kathi Kalu Oghad's* (supra) case, stated that "To bring the statement in question within the prohibition of Article 20 (3), the person accused must have stood in the character of an accused person at the time he had made the statement. It is not enough that he should become an accused, any time after the statement has been made"

In the two earlier cases *M. P. Sharma's* (supra) case, and *Bansilal's* case the Supreme Court in describing a person accused used the expression "against whom a formal accusation had been made", and in *Kathi Kalu Oghad's* case, the Supreme Court used the expression "the person accused must have stood in the character of an accused person". Counsel for Mehta in *Ramash Chandel Mehta v West Bengal*<sup>3</sup> urged that the earlier authorities were superseded in *Kathi Kalu Oghad's* case, and it was ruled that a statement made by a person standing in the character of a person accused of an offence is inadmissible by virtue of Article 20 (3) of the Constitution. But the Court in *Kathi Kalu Oghad's* case, had not set out a different test for determining the stage when a person may be said to be accused of an offence. In *Kathi Kalu Oghad's* case the Court merely set out the principles in the light of the effect of a formal accusation on a person, viz., that he stands in the character of an accused person at the time when he makes the statement. Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the

1. 1970 SC 940 (945).

2. *Raja Narayan Lal Bansi Lal v. Maneck Phirz Mistry*, (1961) 1 SCR 417 (438) : 1961 SC 29 : (1970) 3 SCC 293 quoted in (1978) 2 SCC 446

3. 1970 SC 940 (945).

4. 1961 S C 1808

offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, (which he is bound to do under Article 22 (1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there was an accusation when a complaint was lodged by an officer competent in that behalf before the Magistrate.<sup>1</sup>

The Supreme Court agreed with the High Court that the statements made by Mehta and the other persons accused before the Additional District Magistrate, 24 Parganas, were not inadmissible in evidence because of the protection granted under Article 20 (3) of Constitution.

In *Bhagwandas Goenka's case*<sup>2</sup> Cri. As. Nos. 131 and 132 of 1961, 20-9-1963 (SC) the appellant was charged with using a sum of 4000 dollars borrowed by him when he was on a visit to the United States of America and with depositing cheques of the value of 500 dollars with a foreign bank in which he had an account, and thereby infringed Sections 4 (1) & (3) read with Section 23 of the Foreign Exchange Regulation Act 7 of 1947. At the trial before a Magistrate the appellant contended that the information demanded and obtained from him on September 19, 1952 and May 14, 1953 by the Reserve Bank of India under Section 19 of the Foreign Exchange Regulation Act with respect to the two sums was inadmissible. The Court negatived the contention observing that no information was collected from the accused after July 4, 1955, when he was asked to show cause by the Reserve Bank why he should not be prosecuted for contravention of the various provisions of the Act with respect to the two sums. The Court observed : "The information collected under Section 19 is for the purpose of seeing whether a prosecution should be launched or not. At that stage when information is being collected there is no accusation against the person from whom information is being collected. It may be that after the information has been collected the Central Government or the Reserve Bank may come to the conclusion that there is no case for prosecution and the person concerned may never be accused. It cannot, therefore, be predicated that the person from whom information is being collected under Section 19 is necessarily in the position of an accused. The question whether he should be made an accused is generally decided after the information is collected and it is when a show cause notice is issued, as was done in this case on July 4, 1955, that it can be said that a formal accusation has been made against the person concerned. The judges were, therefore, of the opinion that the appellant was not entitled to the protection of Article 20 (3) with respect to the information that might have been collected from him under Section 19 before July 4, 1955".

Under Section 19 of the Foreign Exchange Regulation Act, 1947, it is open to the Central Government or the Reserve Bank of India, if it considers necessary or expedient, to obtain and examine any information, book or other document in the possession of any person or which in the opinion of the Central Government or the Reserve Bank it is possible for such person to obtain and furnish, by order in writing, to require any such person to furnish, or obtain and furnish, to the Central Government or the Reserve Bank or any person specified in the order with such information, book or other document. The information which was asked for and obtained in *Bhagwandas Goenka's case*, Cri. As. Nos. 131 and 132 of 1961, dated 20-9-1963 (SC) under Section 19 of the Foreign Exchange Regulation Act was not held to be information obtained

1. *Ramesh Chand v. State of West Bengal*, 1970 SC 940 (946) : (1969) 2 SCR 461 (472)
2. 1963 SC (Notes) 285.

in violation of Article 20 (3) of the Constitution for the accusation in the view of the Court was made against the appellant for the first time on July 4, 1955, when the Reserve Bank of India called for an explanation of the appellant why he should not be prosecuted for contravention of the various provisions of the Foreign Exchange Regulation Act. Under the proviso to Section 23 (3) of that Act it is enacted that "where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

In the light of the proviso, the Court assumed that when an authority which is statutorily authorised and bound to call for an explanation before a complaint is filed, serves a formal notice calling for explanation, a formal accusation may be deemed to be made.

The Supreme Court was of the opinion that the view expressed by Sinha, J., in *Calcutta Motor and Cycle Co. v. Collector of Customs*,<sup>1</sup> that a proceeding under Section 171-A of the Sea Customs Act, 1878, being preliminary to a criminal trial any statement procured would be inadmissible under Article 20 (3) there being a formal accusation relating to the commission of an offence within the normal course may result in prosecution, was not correct. Opinion of the Court recorded in appeal from that judgment in *Collector of Customs v. Calcutta Motor and Cycle Co.*,<sup>2</sup> in which Chakravarti, C. J., observed that the protection of Article 20 (3) avails even where a person is not formally accused or charged is inconsistent with the judgments of the Supreme Court already referred, could not also be accepted as correct.

The views expressed by the Madras High Court in *Collector of Customs, Madras v. Kotumal Bhirumal Pihlajani*,<sup>3</sup> ".....the bar under Article 20 (3) of the Constitution will not be available to the statements in the case, since it is not in dispute that they have been recorded only during an investigation undertaken by the Customs Officer under Sections 107 and 108 of the Customs Act of 1952 and at a time when the deponents did not stand in the position of accused in the light of the principles stated in the decisions cited above", and by the Bombay High Court in *Laxman Padma Bhagat v. State*<sup>4</sup> "that a person examined under Section 171-A of the Sea Customs Act, 1878, did not stand in the character of an accused person inasmuch as there was no formal accusation made against him by any person at that time were, in our judgment, substantially correct".

The same proposition was reiterated by Gajendragadkar, C. J. in *Joseph Augusthi v. Narayanan M. A.*<sup>5</sup> and again in *Ramesh Chand Mehta v. State of West Bengal*.

In *Balkishan Devi Dayal v. State of Maharashtra*<sup>7</sup> the Supreme Court said that "only a person against whom a formal accusation of the commission of an offence has been made can be a person 'accused of an offence' within the meaning of Article 20(3). Such formal accusation may be specifically made against him in a F.I.R. or a formal complaint or any other formal

1. 1956 Cal. 253.

2. 1958 Cal. 682.

3. 1967 Mad. 263

4. 1965 Bon. 195.

5. (1964) 7 SCR 137 : 1964 SC 1552.

6. (1969) 2 SCR 461 : 1970 SC 940.

7. (1980) 4 SCC 600.



document or notice served on that person, which ordinarily result in his prosecution in court." In the instant case it was further observed by the Court that no such formal accusation had been made against the appellant when his statement in question were recorded by the R.P.F. Officer. At the relevant time of making the self-incriminatory statement the appellant did not stand in the character of a person accused of an offence and as such the protection of Article 20 (3) was not available to him.<sup>1</sup>

#### 14.17. Article 20 (3) and section 161 Cr. P. C.

Article 20 (3) of the Constitution guarantees that no person accused of any offence shall be compelled to be a witness against himself. Section 161 (2) Cr. P. C., enjoins ; that such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.<sup>2</sup>

The area covered by Article 20 (3) and Section 161 (2) of the Cr. P. C. is substantially the same.

There are only two primary queries involved in this clause that seals the lips into permissible silence ; (i) Is the person called upon to testify 'accused of any offence'? (ii) Is he being compelled to be witness against himself? "A constitutional provision receives its full semantic range and so it follows" said Krishna Iyer, J., "that a wider connotation must be imparted to the expressions 'accused of any offence' and 'to be witness against himself'.

In expression Section 161 (2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20 (3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161 (2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges.<sup>3</sup>

#### 14.18. Accused of any offence.

In Article 20(3), the expression 'accused of any offence' must mean formally accused in *presenti* not in *futuro*—not even imminently. The expression 'to be witness against himself' means more than the court process. Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), the expression applies to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what Section 161 (2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are coterminous in the protective area. While the Code may be changed, the Constitution is more enduring.<sup>4</sup>

1. *Balkishan Devidayal v. State of Maharashtra*, (1980) 4 SCC 600 (623).

2. *Nandini Sathpathy v. Dani*, (1978) 2 SCC 424 (430).

3. *Ibid.*, p. 434.

4. *Ibid.*, p. 435.

## 14.19. Any Person

The question whether the police have power under Section 160 and Section 161 of the Criminal Procedure Code to question a person who then was or in the future may be an accused person was considered by the Privy Council, in *Pakala Narayana Swami v. Emperor*<sup>1</sup> where it was said : "If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both. In any case the reasons would apply as might be thought a fortiori to an alleged statement made by a person ultimately accused."

They reached the conclusion that 'any person' in Section 161, Cr. P. C. would include persons then or ultimately accused. The view was approved in *Mahabir Mandal's*<sup>2</sup> case. The Supreme Court held that "any person supposed to be acquainted with the facts and circumstances of the case includes an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts. The supposition may later prove a fiction but that does not repel the section. Nor does the marginal note 'examination of witnesses by police' clinch the matter. A marginal note clears ambiguity but does not control meaning. Moreover, the suppositious accused figures functionally as a witness. 'To be a witness', from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under Section 161, Cr. P. C. The dichotomy between 'witnesses' and 'accused' used as terms of art, does not hold good here. The amendment by Act XV of 1941, of Section 162 (2) of the Cr. P. C. is a legislative acceptance of the *Pakala Narayana Swami's* reasoning and guards against a possible repercussion of that ruling. The appellant squarely fell within the interrogational ring. To hold otherwise is to hold up investigative exercise, since questioning suspects is desirable for detection of crime and even protection of the accused. Extreme positions may boomerang in law as in politics. Moreover, as the *Miranda*<sup>3</sup> decision states : "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

## 14.20. What is protected by the guarantee.

"The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof".

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*.<sup>4</sup> On the other hand, both Federal and State courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand,

1. 1939 PC 47 (51).

2. (1972) 3 SCR 639 (657) : (1972) 1 SCC 748 (763) : 1972 SC 1331 quoted in (1978) 2 SCC 424 (442).

3. 384 US 436 : 16 L. ed. 694. quoted in (1978) 2 SCC 424 (455).

4. 116 US 616 : 29 L ed 746 : 6 S Ct 524.

to assume a stance, to walk or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it. It was held that the privilege protects an accused only from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."<sup>1</sup>

Now we may consider the stage of the justice process when Article 20 (3) would operate?

Does the ban in Article 20 (3) operate *only* when the evidence previously procured from the accused is sought to be introduced into the case at the trial by the Court? This submission, if approved, may sap the juice and retain the rind of Article 20 (3) doing interpretative violence to the humanist justice of the proscription.<sup>2</sup>

The text of the clause contains no such clue, its intendment is stultified by such a judicial 'amendment' and an expansive construction has the merit of natural meaning, self-fulfilment of the 'silence zone' and the advancement of human rights. The court over ruled the plea for narrowing down the play of the sub-article to the forensic phase of trial. It works where the mischief is, in the womb, *i. e.* the police process. In the language of *Miranda*; Today, than, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect person in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. The constitutional shield must be as broad as the contemplated danger. The Court in *M. P. Sharma's* case (*supra*) took this extended view.<sup>3</sup>

Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Article 20 (3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations was not considered in *M. P. Sharma's* case.

Considered in this light, the guarantee under Article 20 (3) would be available to those person as accused against whom a First Information Report has been recorded therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them.

1. *Schmerber v. California*, 16 L. ed. 2d. 908 (9914-16).
2. (1978) 2 SCC 424 (448).
3. *Ibid*.

**14.21. Self incrimination.**

Now what is an incriminatory statement ? What is compelled testimony ? What is 'being witness against oneself'? when are answers tainted with the tendency to expose an accused to a criminal charge ? When can testimony be castigated as 'compelled'. ?

*Not all relevant answers are criminatory : not all criminatory answers are confessions. Tendency to expose to a criminal charge is wider than actual exposure to such charge. Every fact which has a nexus to any part of a case is relevant, but such nexus with the case does not make it noxious to the accused. Relevance may co-exist with innocence and constitutional censure is attracted only when inference of nocence exists. And an incriminatory inference is not enough for a confession. Only if, without more, the answer establishes guilt, does it amount to a confession. Krishna Iyer, J. took an illustration to explicate the proposition.<sup>1</sup>*

"Let us hypothesize a homicidal episode" the court obscred in *Nandini Satpathy's* case in which A dies and B is suspected of murder ; the scene of the crime being "C". In such a case a bunch of qusetions may be relevant and yet be innocent. Any one who describes the scene as well-wooded or dark or near a stream may be giving relevant evidence of the landscape. Likewise, the medical evidence of the wounds on the deceased and the police evidence of the spots where blood pools were noticed are relevant but *vis-a-vis* B may have no incriminatory force. But an answer that B was seen at or near the scene, at or about the time of the occurrence or had blood on his clothes will be criminatory, is the hazard of inculpatory implication. In this sense, answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20 (3) if elicited by pressure from the mouth of the accused. If the statement goes further to spell in terms that B killed A, it amounts to confession. An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20 (3) strikes at confessions and self-incriminations but leaves untouched other relevant facts.

In *Hoffman v. United States*,<sup>2</sup> the Supreme Court of the United States considered the scope of the privilege against self-incrimination and held that it would extend not only to answers that would in themselves support a conviction but likewise embrace those which would furnish a link in the chain of evidence needed to prosecute the claimant. However, it was clarified that the link must be reasonably strong to make the accused apprehend danger from such answer. Merely because he fancied that by such answer he would incriminate himself he could not claim the privilege of silence. It must appear to the court that the implications of the question, in the setting in which it is asked, make it evident that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The apprehension of incrimination from the answer sought must be substantial and real as distinguished from danger of remote possibilities or fanciful flow of inference. Two things need emphasis. The setting of the particular case, the context and the environment *i. e.*, the totality of circumstances, must inform the perspective of the court adjudging the incriminatory

1. (1978) 2 SCC 424 (449).

2. 341 US 479. quoted in (1978) 2 SCC 424 (450)

injury, and where reasonable doubt exists, the benefit must go in favour of the right to silence by a liberal construction of the article. In *Mallay v. Hogan*,<sup>1</sup> the Court unhesitatingly held that the claim of a witness of privilege against self-incrimination has to be tested on a careful consideration of all the circumstances in the case and where it is clear that the claim is unjustified, the protection is unavailable. Krishna Iyer, J. summarised the *Hoffman* standard and the *Malloy* test. Could the witness (accused) have reasonably sensed the peril of prosecution from his answer in the conspectus of circumstances? That is the true test. The perception of the peculiarities of the case cannot be irrelevant in proper appraisal of self-incriminatory potentiality. The cases of this Court have used different phraseology but set down substantially the same guidelines.<sup>2</sup>

To be witness against oneself is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from 'tendency to be exposed to a criminal charge'. 'A criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused.

#### 14.22. *Compulsion under Article 20 (3).*

The next serious question debated before the Supreme Court in *Nandini Satpathy's* case was as to the connotation of 'compulsion' under Article 20 (3) and its reflection in Section 161 (1). In *Kathi Kulu Oghad's* case (supra), Sinha C. J., explained: "In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement 'Compulsion' in the context, must mean what in law is called 'duress'." In the Dictionary of English Law by Earl Jowitt, 'duress' is explained as follows:

"Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per mines). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person."

"The compulsion in this sense" said "Krishna Iyer, J. is a physical objective act and not the state of the mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20 (3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In

1. 12 L ed. 2d. 653 : 378 US 1 (1964). quoted in *Nandini Satpathy v. Dani*, (1978) 2 SCC 424 (450).

2. *Nandini Satpathy v. Dani*, (1978) 2 SCC 424 (450).

other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it.<sup>1</sup>

#### 14.23. *Compelled testimony.*

In *Nandini Satpathy v. Dani*<sup>2</sup> case the Court held that it was disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, over bearing and intimidatory methods and the like—not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20 (3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violation of Article 20 (3).<sup>3</sup>

In *Yusuf Ali v. State of Maharashtra*,<sup>4</sup> it was argued that by the active deception of the police the appellant was compelled to be a witness against himself. Bachawat, J. said "We can not say that the appellant was compelled to be a witness against himself. He was free to talk or not to talk. His conversation with Shaikh was voluntary. There was no element of duress, coercion or compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes. He cannot claim the protection of Art. 20 (3). The fact that the tape recording was done without his knowledge is not of itself an objection of its admissibility in evidence.

#### 14.24. *Third person may be incriminated—no protection under article.*

This privilege is not intended to permit a person to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. This privilege is limited to a person who shall be compelled in a criminal case to be a witness against himself. It is extortion of information from the accused himself, that offends our sense of justice.

When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. The Courts have also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor.<sup>5</sup>

1. *Nandini Satpathy v. Dani*, (1978) 2 SCC 424 (452).

2. *Ibid.*

3. *Ibid.*, 454.

4. 1968 SC 147 (150).

5. *Fisher v. United States*, 49 L ed. 41 (56) : 425 US 412.

\* This article does not proscribe the compelled production of every sort of incriminatory evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating. The Courts have declined to extend the protection of the privilege to the giving of blood samples. "Since the blood test evidence although an incriminating product of compulsion was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner to the giving of handwriting exemplars<sup>1</sup> voice exemplars<sup>2</sup> or the donning of a blouse worn by the perpetrator of crime.<sup>3</sup>

**14 25. Summoning of documents—specimen handwriting, thumb impression etc. of accused and Article 20 (3).**

In *State of Bombay v. Kathi Kalu Oghad*<sup>4</sup> a question arose whether obtaining specimen handwriting or thumb impression of the accused would contravene the constitutional guarantee in Article 20 (3). Two opinions were handed down, one by Chief Justice Sinha for himself and seven brother judges and another by Das Gupta, J., for himself and 2 other colleagues. In Sinha, C. J.'s opinion, the observation in *M. P. Sharma*<sup>5</sup> case that Section 139 of the Evidence Act had no bearing on the connotation of the word 'witness' was not entirely well founded in law. Immunity from self-incrimination as re-enacted in Article 20 (3) was held to mean conveying information based upon the personal knowledge of the person giving the information and could not include merely the mechanical process of producing documents in court which might throw a light on any of the point in controversy, but did not contain any statement of the accused based on his personal knowledge. It was concluded that to be a witness was not equivalent to furnishing evidence in its widest significance ; that is to say, as including not merely making of oral or written statement but also production of document or giving materials which might be relevant at trial to determine the innocence or guilt of the accused.' It was held that when an accused person was compelled to give a specimen hand writing or impressions by his finger, palm or foot it might be said that he had been compelled to be a witness it could not however be said that he had been compelled to be a witness against himself.<sup>6</sup>

What was left open in *Sharma's* case, whether a person accused of an offence could be served with a summons to produce documents, was decided when it was observed that immunity from self-incrimination would to comprehend the mechanical process of producing documents in court which may throw a light on any of the points in controversy but which did not contain a statement of the accused based on his personal knowledge. In *State of U. P. v. Boota Singh*<sup>7</sup> it was argued that the act of the investigating officer in taking specimen signature of Boota Singh was but by Section 162 of the Criminal Procedure Code and also amounted to testimonial compulsion so as to violate the guarantee contained in Article 20 (3). Following the case of *State of Bombay v. Kathi Kalu Oghad*<sup>8</sup> the court held that taking a specimen handwriting was not hit by Article 20 (3).

1. *Gilbert v. California*, 18 L. ed. 2nd 1178.

2. *United States v. Wade*, 18 L. ed. 2nd 1149.

3. *Holt v. United States*, 54 L. ed. 1021.

4. 1961 SC 1808.

5. 1954 SC 1077 ; 1954 SC 300.

6. *V. S. Kuttan Pillai v. Rama Krishnan*, (1980) 1 SCC 264 (269).

7. (1979) 1 SCC 81.

8. (1962) 3 SCR 10 : 1961 SC 1808.

In *Shyam Lal Mohan Lal v. State of Gujarat*<sup>1</sup> appellant Shyam Lal Mohan Lal was a licensed money-lender, he was under an obligation to maintain books. He was prosecuted for failing to maintain books in accordance with the provisions of the Act and the Rules. The police prosecutor in charge of the prosecution presented an application requesting the Court to order the appellant Shyam Lal Mohan Lal to produce daily book and ledger for a certain year. Presumably it was a request to issue summons as contemplated by Section 94 of the old Code of Criminal Procedure. The Magistrate rejected the request on the ground that in so doing the guarantee of immunity from self-incrimination would be violated. The matter ultimately came to the Supreme Court and the question that was put in the fore-front before the Court was whether the expression 'person' in Section 94 (1) which is the same as Section 91 (1) of the new Code, comprehends within its sweep a person accused of an offence and it does, whether an issue of summons to produce a document in his possession or power would violate the immunity against self-incrimination guaranteed by Article 20 (3). The majority opinion handed down by Sikri, J. ruled that Section 94 (1) upon its true construction did not apply to an accused person. While recording this opinion there was no reference to the decision of the larger Bench in *Kathi Kalu Oghad* case. Shah, J. in his dissenting judgment observed that the accused might have documentary evidence in his possession which might throw some light on the controversy and if it was a document which was not his statement conveying his personal knowledge relating to the charge against him, he may be called upon to produce it. Proceeding further it was observed that Article 20 (3) would be no bar to the summons being issued to a person accused of an offence to produce a thing or document except in the circumstances here-in-above mentioned. Whatever that may be, it is indisputable that according to the majority opinion the expression 'person' in Section 91 (1), (new Code) did not take within its sweep a person accused of an offence which would mean that a summons issued to an accused person to produce a thing or document considered necessary or desirable for the purpose of an investigation, inquiry or trial would imply compulsion and the document or thing so produced would be compelled testimony and would be violative of the constitutional immunity against self-incrimination.<sup>2</sup>

There appears to be some conflict between the observations in *M. P. Sharma* case as reconsidered in *Kathi Kalu Oghad* case and the one in the case of *Shyam Lal Mohan Lal*. However, as this case was not directly relatable to a summons issued under Section 91 (1), Desai and Chinnappa Reddy, JJ. did not consider it necessary to refer the matter to a larger Bench to resolve the conflict.

In view of the decision in *Shyam Lal Mohan Lal* case one must proceed on the basis that a summons to produce a thing or document as contemplated by Section 91 (1) could not be issued to a person accused of an offence calling upon him to produce document or thing considered necessary or desirable for the purpose of an investigation, inquiry, trial or other proceeding under the Code of Criminal Procedure.

#### 14.26. Search and seizure and Article 20 (3).

The wider question that was raised soon after the enforcement of the Constitution was whether search of the premises occupied or in possession of a person accused of an offence or seizure of anything therefrom would violate the immunity from self-incrimination enacted in Article 20 (3).<sup>3</sup> In *M. P.*

1. (1965) 2 SCR 47: 1965 SC 125.

2. *V. S. Kuttan Pillai v. Rama Krishnan*, (1980) 1 SCC 264 (270.)

3. *V. S. Kuttan Pillai v. Rama Krishnan* (1980) 1 SCC 264 (268).



*Sharma v. Satish Chandra, District Magistrate*<sup>1</sup>, the contention put forth was that search to obtain document for investigation in to an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by Article 20 (3) as unconstitutional and illegal. A specific reference was made to Sections 94 and 96 of the Criminal Procedure Code, 1898 ('old Code' for short), both of which were re-enacted in almost identical language as Sections 91 and 93 in the new Code, in support of the submission that seizure of documents on search was in the contemplation of law a compelled production of document. A Constitution Bench of eight Judges of the Supreme Court unanimously negated that contention observing :

"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different Fundamental right, by some process of strained construction. Nor, is it legitimate to assume that the constitutional protection under Article 20 (3) would be defeated by the statutory provisions for searches."

1. 1954 SCR 1077 (1096) : 1954 SC 300.

# 15

## Protection of Life and Personal Liberty

### SYNOPSIS

- 15.1. Scope and ambit of Article 21
- 15.2. Article 21... 'life' meaning.
- 15.3. Personal Liberty.
- 15.4. Due Process of Law.
- 15.5. Procedure established by law does not require every step in the procedure to be prescribed.
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- 15.16. Marriage... Personal liberty ... Procreation of children
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- 15.18. Article 21 and Section 302 Cr. P. C.... Guidelines for inflicting capital punishment.
- 15.19. Vaccination.
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- 15.21. To keep in Jail for indefinite period.
- 15.22. Punishment.
- 15.23. Death Sentence.

15.24. Execution of Death Sentence.

15.25. Prison Justice and Courts.

15.26. Burden of Proof.

### 15.1. Scope and ambit of Article 21.

No person shall be deprived of his life or personal liberty except according to procedure established by law. This is the guarantee enshrined in Article 21 of the Constitution.

In *Francis Coralie v. Union Territory*<sup>1</sup> Bhagwati, J., posed the question as to what was the true scope and ambit of the right to life guaranteed.

Under Article 21 of the Constitution there is nothing like "a right to life." In what sense it is a right certainly not in the sense used by Salmond or Hohfeld or other authors on jurisprudence. According to Dias the word "right" connotes four different ideas concerning the activity, or potential activity ; of one person with reference to another. Those relationships are designated "Jural Relations".<sup>2</sup>

Hohfeld in his table of Jural relations put Right Duty as jural relatives and Right (or claim) and no claims (no right) as jural opposites. Jural relations between any two parties should be considered only as between them, even though the conduct of one may create other jural relations between him and some one else.<sup>3</sup>

Any person on being born or in continuing to live does not enter into any jural relationship with another.

In this connection it is apposite to quote an urdu poet who said :

Laie Hyat Aye-Le Chali

qaza chale.

Apni Khushi na Aaye

na Apni Khushi Chale

Life brought me, I came,

Death took me away I went

Ncither I came of my accord

nor went with my consent.

The scope of the words 'life and liberty' both of which occur in Fifth and Fourteenth Amendments of the U.S. Constitution, which to some extent are the precursor of Article 21, have been vividly explained by Field, J. in *Munn v. Illinois*<sup>4</sup> :

"By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally

1. 1981 SC 752.

2. Dias : Jurisprudence, 4th Edn. p. 33-34.

3. *Ibid.*, p. 35.

4. 1877 94 US 113-(142); quoted in *Sunil Batra v. Delhi Administration*, 1978 SC 1675 (1731).

prohibits the mutilation of the body or the amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.....by the term liberty, as used in the provision, something more is meant than mere freedom from physical restraint or the bonds of a prison."

This statement of law was approved by a Constitution Bench of the Supreme Court in *Kharuk Singh v. State of U. P.*,<sup>1</sup> as also in *D. B. Patnaik*<sup>2</sup>

This view was again accepted as laying down the correct law by the Supreme Court in the first *Sunil Batra's*<sup>3</sup> case. Every limb or faculty through which life is enjoyed is thus protected by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all : it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.<sup>4</sup>

### 15.2. Article 21—'Life' meaning.

The question of livelihood is included in the freedoms enumerated in Article 19 particularly Clause (g) or even in Article 16 in a limited sense, but the word "life" in Article 21 does not include 'livelihood'.<sup>5</sup>

The question which often arises is whether Article 21 relating to right to life is limited only to protection of limb or faculty or does it go further and embrace some-thing more. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.<sup>6</sup>

Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness : it would plainly be unconstitutional and void as being violative

1. (1964) 1 SCR 332 347 : AIR 1963 SC 1295 (1302).

2. AIR 1974 SC 2092.

3. 1978 SC 1675.

4. *Francis Coralle v. Union Territory*, 1981 SC 746 (753).

5. *In re Sant Ram*, 1960 SC 932 (935).

6. *Francis Coralle v. Union Territory*, 1981 SC 746 (753).

of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights. This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged according to procedure established by law and therefore when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration. The prisoner or detenu obviously cannot move about freely by going outside the prison walls nor can he socialise at his free will with persons outside the jail. But, as part of the right to live with human dignity and therefore as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just. The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21, for the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that Article. The expression 'personal liberty' occurring in Article 21 has been given a broad and liberal interpretation in *Maneka Gandhi's*<sup>1</sup> case and it has been held in that case that the expression 'personal liberty' used in that Article is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and it also includes rights which "have been raised to the status of distinct Fundamental Rights and given additional protection under Article 19".<sup>2</sup>

### 15.3. Personal Liberty.

Personal liberties may be compendiously summed up as the right to do as one pleases within the law, because liberty is not unbridled licence. It is what Edmund Burke called 'regulated freedom'. Montesquieu in Book III, Chap. III, of his *Spirit of the Laws*, said :

"In Governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow citizens would enjoy the same power."

To the same effect are the following observations of Webster<sup>3</sup>

"Liberty is the creation of law, essentially different from the authorised licentiousness that trespasses on right. It is a legal and refined idea, the offspring of high civilization, which the savage never understand, and never can understand. Liberty exists in proportion to wholesome restraint ; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose

1. *Maneka Gandhi v. Union of India*, 1978 SC 597.

2. *Francis Coralie v. Union Territory*, 1981 SC 746 (753-4).

3. Webster in his *Works*, Vol. II, p. 393 quoted in *A. K. Gopalan v. State of Madras*, 1950 SC 1000.

that liberty consists in a paucity of laws..... The working of our complex system, full of checks and restraints on legislative, executive and judicial power is favourable to liberty and justice. These checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury."

Restraints on liberty should be judged not only subjectively as applied to a few individuals who come within their operations but also objectively as securing the liberty of a far greater number of individuals. Social interest in individual liberty may well have to be subordinated to other greater social interests. If a law ensures and protects the greater social interests then such law will be a wholesome and beneficent law although it may infringe the liberty of some individuals, for, it will enure for the greater liberty of the rest of the members of the society. At the same time, our liberty has also to be guarded against executive, legislative as well as judicial usurpation of powers and prerogatives. Subject to certain restraints on individuals and reasonable checks on the State every person has a variety of personal liberties too numerous to be catalogued. Our Constitution has recognised personal liberties as fundamental rights. It has guaranteed some of them under Article 19(1) but put restraints on them by Cls. (2) to (6). It has put checks on the State's legislative powers by Articles 21 and 22. It has by providing or preventive detention, recognised that individual liberty may be subordinated to the larger social interests.<sup>1</sup>

The Words "personal liberty" which have a definite connotation in law do not mean only liberty of the person but it means liberty or the rights attached to the person (*jus personarum*). The expressions "freedom of life" or "personal liberty" are not to be found in Article 19 and it will be straining the language of Article 19 to squeeze in, personal liberty into that Article. In any case the right to life cannot be read into Article 19. Article 19 being confined, in its operation, to citizen only, a non-citizen will have no protection for his life and personal liberty except what has been called the procedural protection of Article 21. If there be no substantive right what will the procedure protect? It is not imperative that a foreigner should have the same privileges as are given to a citizen, but a foreigner will have equal protection for his life and personal liberty before the laws of our country under our Constitution.<sup>2</sup>

In *Gopalan's* case it was urged that the expression 'personal liberty' was synonymous with the right to move freely and, therefore, came directly under Article 19 (1) (d). Reference was made to the unreported dissenting judgment of Sen, J. of Calcutta in *K. Shitendra v. Chief Secretary of West Bengal*.<sup>3</sup> In his judgment Sen, J. quoted the following passage from Blackstone's Commentaries:<sup>4</sup>

"Next to personal security the law of England regards, asserts and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."

On the authority of the above passage the Judge concluded that personal liberty came within Article 19 (1) (d). It is difficult to agree with the

1. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (108).

2. *Ibid.*, p. 110 para 219.

3. Misc. case No. 166 of 1950.

4. George Chase's Edition (End. 4) page 73 Blackstone, Book I, Chap. I.

learned Judge's conclusion. On a perusal of Chapter 1 of Book I of Blackstone's Commentaries, Das, J. said it will appear that the learned commentator divided the rights attached to the person (*jus personarum*) into two classes, namely, 'personal security' and 'personal liberty': Under the head 'personal security' Blackstone included several rights, namely, the rights to life, limb, body, health and reputation, and under the head 'personal liberty' he placed only the right of free movement. He first dealt with the several rights classified by him under the head 'personal security' and then proceeded to say that next to those rights came personal liberty which according to his classification consisted only in the right of free locomotion. There is no reason to suppose that in Article 21 of our Constitution the expression 'personal liberty' has been used in the restricted sense in which Blackstone used it in his Commentaries. If 'personal liberty' in Article 21 were synonymous with the right to move freely which is mentioned in Article 19 (1) (d), then the astounding result will be that only the last mentioned right has what has been called the procedural protection of Article 21 but none of the other rights in the other sub-clauses of Article 19 (1) has any procedural protection at all.

Article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Article 21 as compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men.<sup>1</sup>

It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words 'personal liberty' as used in this Article? This question incidentally came up for discussion in some of the judgments in *A. K. Gopalan v. State of Madras*,<sup>2</sup> and the observations made by Patanjali Sastri, J., Mukherjee, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Articles 19 and 21. It was in *Kharak Singh v. State of U. P.*,<sup>3</sup> that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before the Supreme Court. The majority of the Judges took the view "that 'personal liberty' was used in the article as a compendious term to include within itself all the varieties of rights which went to make up the personal liberties of man other than those dealt with in the several clauses of Article 19 (1)."<sup>4</sup> In other words, while Article 19 (1) dealt with particular species or attributes of that freedom, 'personal liberty' in Article 21 took in and comprised the residue." The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words:

"No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and therefore the expression 'personal liberty' in Article 21 excludes that

1. *A. K. Gopalan v. State of Madras*, 1950 SC 28 (110-111).

2. 1950 SCR 88 ; 1950 SC 27.

3. (1964) 1 SCR 332 : AIR 1963 SC 1295

4. 1978 SC 597 (620) para 54.

attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19 (2) so far as the attributes covered by Article 19 (1) are concerned."

There can be no doubt, the Supreme Court said in *Maneka Gandhi's* case<sup>1</sup> that in view of the decision of the Supreme Court in *R.C. Cooper v. Union of India*.<sup>2</sup> the minority view must be regarded as correct and the majority view must be held to have been overruled." According to this decision, which was a decision given by the full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in *A. K. Gopalan's* case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 were exclusive. Each article enacting a code relating to the protection of distinct rights, but this theory was overturned in *R. C. Cooper's* case where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in *A. K. Gopalan's* case that certain articles in the Constitution exclusively deal with specific matters cannot be accepted as correct." It was held in *R. C. Cooper's* case and that is clear from the judgment of Shah, J., because Shah, J. in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C. J., Patanjali Sastri, J., Mahajan J., Mukherjee, J. and S R. Das, J. in *A. K. Gopalan's* case that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19 (1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19 (1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19 (1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely freedom from detention and thus falls indisputably within Article 21 would not require to be tested on the touchstone of clause (d) of Article 19 (1) and yet it was held by a Bench of seven Judges of the Supreme Court in *Shimbu Nath Sarkar v. State of West Bengal*<sup>3</sup> that such a law would have to satisfy the requirement *inter alia* of Article 19 (1), clause (d) and in *Haradhan Saha v. State of West Bengal*<sup>4</sup> which was a decision given by a Bench of five judges, the Court considered the challenge of clause (d) of Article 19 (1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that the Act did not violate the constitutional guarantee embodied in that Article. It is indeed difficult to see on what

1. *Maneka Gandhi v. Union of India*, 1978 SC 597 (621).

2. (1970) 3 SCR 530 : AIR 1970 SC 564

3. AIR 1973 SC 1425

4. AIR 1974 SC 2154.



principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19.<sup>1</sup>

#### 15.4. *Due Process of Law.*

The thirty-ninth clause of the *Magna Carta* provides that "no freeman shall be taken or and imprisoned or disseised or outlawed or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or and by the law of the land<sup>2</sup> Edward II substituted "by due process of law for the, 'laws of the land.'" In the Petition of Rights of 1629 (to Charter I) the language used was "that freeman be imprisoned or detained only by the law of the land or by due process of law and not by the King's special command."<sup>3</sup>

#### 15.5. *Procedure established by law does not require every step in the procedure to be prescribed.*

Article 21 of the constitution runs thus : "No person shall be deprived of his life or personal liberty except according to procedure established by law."

In *A. K. Gopalan's* case<sup>4</sup> the contention of the petitioner was that by this Article the Constitution offered to every person, citizen or non-citizen, only a procedural protection and that the Article did not purport to give any protection to life or personal liberty as a substantive right but only prescribed a procedure that must be followed before a person may be deprived of his life or personal liberty. But Das, J said ; I am unable to accept this contention. Article 21, as the marginal note states, guarantees to every person "protection of life and personal liberty." As I read it, it defined the substantive fundamental right to which protection is given and does not purport to prescribe any particular procedure at all. That a person shall not be deprived of his life or personal liberty except according to procedure established by law is the substantive fundamental right to which protection is given by the Constitution. The avowed object of the Article, is to define the ambit of the right to life and personal liberty which is to be protected as a fundamental right. The right to life and personal liberty protected by Article 21 is not an absolute right but is a qualified right—a right circumscribed by the possibility or risk of being lost according to procedure established by law. Liability to deprivation according to procedure established by law is in the nature of words of limitation. The Article delimits the right by reference to its liability to deprivation according to procedure established by law and by this very definition throws a corresponding obligation on the State to follow a procedure before depriving a man of his life and personal liberty. What that procedure is to be is not within the purpose or purview of this Article to prescribe or indicate.

#### 15.6. *Article 21—substantive law.*

Article 21, lays down substantive law as giving protection to life and liberty inasmuch as it says that they cannot be deprived except according to

1. *Maneka Gandhi v. Union of India*, 1978 SC 597 (620-621).
2. Holdsworth : *A History of English Law*, Vol. I, p. 59.
3. Willis *Constitutional Law* p. 646.
4. 1950 SC 27 (114).

the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent, there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the executive. It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. It negatives the idea of fantastic, arbitrary and oppressive forms of proceedings.<sup>1</sup>

Article 21 of the Constitution, which lays down that "no person shall be deprived of his life or..... personal liberty, except according to procedure established by law." On a plain reading of the Article, the meaning seems to be that you cannot deprive a man of his personal liberty, unless you follow and act according to the law which provides for deprivation of such liberty. The expression 'procedure' means the manner and form of enforcing the law. In my opinion said Das, J. in *Gopalan's* case it cannot be disputed that in order that there may be a legally established procedure, the law which establishes it must be valid and lawful law which the legislature is competent to enact in accordance with Article 245 of the Constitution and the particular items in the legislative lists which it relates to. It is also not disputed that such law must not offend against the fundamental rights which are declared in Part III of the Constitution.<sup>2</sup>

#### 15.7. Article 21—State made law and not rules of natural law.

What Article 21 emphasises according to *A. K. Gopalan's* case is that the deprivation of the right to life or liberty must be brought about by a State-made law and not by the rules of natural law.<sup>3</sup> But it is not so. Reference may usefully be made in this behalf to a few representative decisions which illustrate that Article 21 takes in laws other than those enacted by the legislature. In *Re ; Sant Ram*,<sup>4</sup> the Rules made by the Supreme Court; in *State of Nagaland v. Ratan Singh*,<sup>5</sup> the rules made for the governance of Nagaland Hills District; in *Govind v. State of Madhya Pradesh*,<sup>6</sup> the Regulations made under the Police Act; in *Ratilal Bhanji Mithani v. Asst. Collector of Customs, Bombay*<sup>7</sup> the Rules made by the High Court, under Article 225 of the Constitution, and in *Pandit M.S.M. Sharma v. Shri Sri Krishna Sinha*,<sup>8</sup> the Rules made by a House of Legislature under Article 208, were all regarded as laying down procedure established by 'law' for the purposes of Article 21. An Ordinance is also 'law' within the meaning of Article 21 of the Constitution.<sup>9</sup>

'Procedure established by law' are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion, procedure' means 'fair and reasonable procedure' which comports with civilised norms like

1. *A.K. Gopalan v. State of Madras*, 1950 SC 27 (84) per Mahajan, J.; *Maneka Gandhi v. Union of India*, 1978 SC 597 (660).

2. *A. K. Gopalan, v. State of Madras*, 1950 SC 27 (97).

3. *Ibid.*, p. 88 (111, 169, 199, 229, 236 and 308-309) : AIR 1950 SC 27 (39, 60, 61).

4. (1960) 3 SCR 499 (506) : AIR 1960 SC 932 (935).

5. (1966) 3 SCR 830 (851, 852) : AIR 1967 SC 212 (223, 224).

6. (1975) 3 SCR 955-956 : AIR 1975 SC 1378 (1383, 1386).

7. (1967) 3 SCR 926 (928-931) : AIR 1967 SC 1639 (1641, 1642, 1643).

8. (1959) Supp. (1) SCR 806 (860-861) : AIR 1959 SC 395 (410-411).

9. *A. K. Roy v. Union of India*, (1982) 1 SCC 271 (294).

natural justice rooted firm in community consciousness, — not primitive processual barbarity nor legislated normative mockery.<sup>1</sup> In a land-mark case *Maneka Gandhi*,<sup>2</sup> Bhagwati, J. (on this point the Court was unanimous) explained :

“Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable ? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements ? Obviously, the procedure cannot be arbitrary, unfair or unreasonable.”

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive ; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.<sup>3</sup> Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21. .

In *Maneka Gandhi*<sup>4</sup> case Krishna Iyer, J., said : “Procedure established by law”, with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex-necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21. Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21, has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus understood, ‘procedure’ must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised process. What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word ‘established’ which means ‘settled firmly’ not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes ‘established’ procedure. And ‘law’ leaves little doubt that it is normae regarded as just since law is the means and justice is the end. Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights : observance of fundamental rights is not regarded as good politics and their transgression as bad politics. To sum up, ‘procedure’ in Article 21 means fair, not formal procedure. ‘Law’ is reasonable law, not any enacted piece.”<sup>5</sup>

1. *Haskot v. State of Maharashtra*, (1978) SC 1548 (1553).

2. *Maneka Gandhi v. Union of India*, 1978 SC 597 (619, 622 and 624 : (1978) 1 SCC 249 (277, 281 and 284).

3. 1978 SC 597 (619, 622, 624).

4. 1978 SC 597 (658).

5. *Ibid.*, p. 659 ; *Hoskot v. State of Maharashtra*, 1978 SC 1548 (1554).

### 15.8. Freedom to go Abroad.

It cannot be disputed that there must exist a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values. This basic freedom of the human being is expressed at various levels and is reflected in various basic rights. Freedom to go abroad is one of such rights, for the nature of man as a free agent necessarily involves free movement on his part. There can be no doubt that if the purpose and the sense of the State is to protect personality and its development, as indeed it should be of any liberal democratic State, freedom to go abroad must be given its due place amongst the basic rights. This right is an important basic human right for it nourishes independent and self-determining creative character of the individual, not only by extending his freedom of action, but also by extending the scope of the experience. It is a right which gives intellectual and creative worker in particular the opportunity of extending their spiritual and intellectual horizon through study at foreign universities, through contact with foreign colleagues and through participation in discussions and conferences. The right also extends to private life : marriage, family and friendship are humanities which can be rarely effected through refusal of freedom to go abroad and clearly show that this freedom is a genuine human right. Moreover, this freedom would be highly valuable right where man finds himself obliged to flee (a) because he is unable to serve his God as he wished at the previous place of residence, (b) because his personal freedom is threatened for reasons which do not constitute a crime in the usual meaning of the word and many were such cases during the emergency, or (c) because his life is threatened either for religious or political reasons or through the threat to the maintenance of minimum standard of living compatible with human dignity. These reasons suggest that freedom to go abroad incorporates the important function of an *ultimum refugium libertatis* when other basic freedoms are refused. To quote the words of Mr. Justice Douglas in *Kent v. Dulles*,<sup>1</sup> freedom to go abroad has much social value and represents a basic human right of great significance. It is in fact incorporated as an inalienable human right in Article 13 of the Universal Declaration of Human Rights. But it is not specifically named as a fundamental right in Article 19 (1). Does it mean that on that account it cannot be a fundamental right covered by Article 19 (1) ?<sup>2</sup>

Mr. Justice Douglas said in *Kent v. Dulles*,<sup>3</sup> that Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. And what the learned Judge said in regard to freedom of movement in his country holds good in our country as well.<sup>4</sup>

In *Satwant Singh Sawhney v. D. Ramarathnam*,<sup>5</sup> the Supreme Court ruled by majority that the expression 'personal liberty' which occurs in Article 21 of the Constitution includes the right to travel abroad and that no person can be deprived of that right except according to procedure established by law. The Passports Act which was enacted by Parliament in 1967 in order to comply

1. (1958) 357 US 116 : 2 L ed. 2d 1204.

2. *Maneka Gandhi v. Union of India*, 1978 SC 597 (639).

3. (1958) 357 US 116 : 2 L ed. 2d 1204.

4. *Maneka Gandhi v. Union of India*, 1978 SC 597 (641).

5. (1967) 3 SCR 525 : 1967 SC 1836.

with that decision prescribed the procedure whereby an application for a passport might be granted fully or partially, with or without any endorsement, and a passport once granted might later be revoked or impounded. But the mere prescription of some kind of procedure could not ever meet the mandate of Article 21. The procedure prescribed by law had to be fair, just and reasonable not fanciful, oppressive or arbitrary.<sup>1</sup>

The right to go abroad is, as held in *Satwant Singh Sawhney's*<sup>2</sup> case included in 'personal liberty' within the meaning of Article 21 and is thus a fundamental right protected by that Article. When the State issues a passport and grants endorsement for one country, but refuses for another, the person concerned can certainly go out of India but he is prevented from going to the country for which the endorsement is refused and his right to go to that country is taken away. This cannot be done by the State under Article 21 unless there is a law authorising the State to do so and the action is taken in accordance with the procedure prescribed by such law. The right to go abroad, and in particular to a specified country, is clearly a right to personal liberty exercisable outside India yet it has been held in *Satwant Singh Sawhney's* case to be a fundamental right protected by Article 21. This clearly shows that there is no underlying principle in the Constitution which limits the fundamental rights in their operation to the territory of India.<sup>3</sup>

This view which the Court took is completely in accord with the thinking on the subject in the United States. There the preponderance of opinion is that the protection of the Bill of Rights is available to United States citizens even in foreign countries.<sup>4</sup> There is an interesting article, on "The Constitutional Right to Travel"<sup>5</sup> where Leonard B. Boudin writes :

"The final objection to limitations upon the right to travel is that they interfere with the individual's freedom of expression. Travel itself is such a freedom in the view of one scholarly jurist. But we need not go that far ; it is enough that the freedom of speech includes the right of Americans to exercise it any-where without the interference of their government. There are no geographical limitations to the Bill of Rights. A Government that sets up barriers to its citizens' freedom of expression in any country in the world violates the Constitution as much as it it enjoined such expression in the United States."

These observations were quoted with approval by Hegde, J., (as he then was) speaking on behalf of a Division Bench of the Karnataka High Court in *Dr. S. S. Sarlashiva Rao v. Union of India*,<sup>6</sup> and the learned Judge there pointed out that "These observations apply in equal force to the conditions prevailing in this country" It is obvious, therefore, that there are no geographical limitations to freedom of speech and expression guaranteed under Article 19 (1) (a) and this freedom is exercisable not only in India but also outside and if State action sets up barriers to its citizens' freedom of expression in any country in the world, it would violate Article 19 (1) (a) as much as if it inhibited such expression within the country. This conclusion would on a parity of reason-

1. *Maneka Gandhi v. Union of India*, 1978 SC 597 (613) per Chandrachud, J.

2. AIR 1967 SC 1836.

3. *Maneka Gandhi v. Union of India*, 1978 SC 597 (638).

4. *Best v. United States*, 184 Federal Reporter, 2d 131 quoted in *Maneka Gandhi v. Union of India*, 1978 SC (638).

5. 1956 Columbia Law Review.

6. (1965) 2 Mys LJ 605.

ing apply equally in relation to the fundamental right to practice any profession or to carry on any occupation, trade or business guaranteed under Article 19 (1) (g).

### 15.9. Speedy Trial.

In the United States, speedy trial is one of the constitutionally guaranteed rights.<sup>1</sup> The Sixth Amendment to the constitution provides that ;

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”

- So also Article 3 of the European Convention on Human Rights provides that :

“every one arrested or detained, shall be entitled to trial within a reasonable time or to release pending trial.”

In *Hussainara v. State of Bihar*,<sup>2</sup> the Supreme Court said that even under our Constitution speedy trial was not specifically enumerated as a fundamental right it was implicit in the broad sweep and content of Article 21 as interpreted by the Court in *Maneka Gandhi v. Union of India*.<sup>3</sup>

No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential right to life and liberty enshrined in Article 21.

Now what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21. The Supreme Court did not answer these questions but heard the cases on merit.

It is the Constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of the Supreme Court, as the guardian of the fundamental rights of the people, as a sentinel on the *qui vive*, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial.<sup>4</sup>

1. *Hussainara Khatoon v. State of Bihar*, 1979 SC 1360 (1365).

2. 1979 SC 1360 (1365).

3. AIR 1978 SC 597.

4. *Hussainara Khatoon v. State of Bihar*, 1979 SC 1360 (1376).

## 15.10. Open trial.

It is well settled that in general, all cases brought before the Courts, whether civil, criminal, or others, must be heard in open court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, courts must generally hear causes in open and must permit the public admission to the court-room.<sup>1</sup>

In *Naresh Shridhar Mirajkar v. State of Maharashtra*,<sup>2</sup> where the Supreme Court while dealing with the question of holding proceedings in camera observed as follows "Cases may however occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, it is open to him in exercise of his inherent power to hold the trial in camera either partly or fully." In *Naresh v. State of Maharashtra*<sup>3</sup> the Supreme Court felt no hesitation in holding that the High Court had inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily required the adoption of such a course.....It is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice."

It is true that offences under some Acts are very serious offences and maintenance of secrecy is of the very essence of the matter but that by itself will not justify the legislature to pass an Act so as to deprive an accused of the valuable right to defend or, for that matter to stifle the defence itself.<sup>4</sup> The importance of holding trial in camera in cases under the Official Secrets Act had been emphasised in *R. v. Socialist Worker Printers and Publishers Ltd.*,<sup>5</sup> where Lord Widgery, C. J., observed as follows :

"When one has an order for trial in camera, all the public and all the press are evicted at one fell swoop and the entire supervision by the public is gone.....The actual conduct of the trial, the success or otherwise of the defendant, does not turn on this kind of thing, and very often the only value of the witness's name being given as opposed to it being withheld is that if it is published up and down the country other witnesses may discover that they can help in regard to the case and come forward."

1. *Naresh Shridhar Mirajkar v. State of Maharashtra*, 1967 SC 1 (8).

2. (1966) 3 SCR 744 : 1967 SC 1.

3. *Ibid.*

4. *Suptd. & Remembrancer of Legal Affairs v. S. Bhowmick*, 1981 SC 917 (921).

5. (1975) 1 All ER 142.

### 15.11. Article 21 and Prisoners.

The courts possess, and must exercise, jurisdiction to review disciplinary decisions until Parliament expressly says otherwise. Heavy stress is laid on the issues of principle involved. While prisoners are subject to a special regimen and have a special status, they are not entirely denuded of all the fundamental rights which are inherent in our constitution. The rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as the result of some punitive or other process.....An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise. What should be the nature and measure of the relief accorded must be a matter for the courts. Public policy or expediency as well as merits may be factors to consider and they may influence the answer to any application for relief; but to deny jurisdiction on the ground of expediency seems to me...to be tantamount to abdicating a primary function of the judiciary.<sup>1</sup>

### 15.12. Articles, 14, 19 and 21—Handcuffing of Prisoners.

The Court of Appeal's decision<sup>2</sup> brings English law into line with that in several other common law jurisdictions. The judgments of Megaw and Shaw, L.JJ. drew upon the New Zealand Supreme Court unreported case of *Daemar v. Hall*<sup>3</sup> in favour of reviewability, a conclusion also reached in Canada and the United States. In Ireland, too, unreported decisions treat the applicability of natural justice and judicial review to prison discipline as axiomatic. The Supreme Court has recently deplored the practice of bringing matters of prison administration before the courts by way of habeas corpus, but it did not suggest that such questions were not justiciable. O. Higgins, C. J. said :

“.....applications under Article 40.4 (of the Constitution) are not suitable for the judicial investigation of complaints as to conviction, sentence and conditions of detention which fall short of that requirement (that the detention is not in accordance with law.)” These fall to be investigated, where necessary, under other forms of proceedings”.

“One had difficulty” said Mr. Casey “in believing that the state of English prison discipline was so fragile and parlous as to require the Divisional Court's “Hands off” doctrine. Far from producing the dire results feared by Lord Widgery and his colleagues, the availability of judicial review may have beneficial effects. It is, after all, a means of ensuring that disciplinary decisions will be fair and *intra vires*. Refusal to intervene could easily become a charter for arbitrariness and illegality, which could generate resentments much more dangerous to good order than any possible involvement of the courts. Thus, the Court of Appeal's decision may be as practical as it is principled”.<sup>4</sup>

Article 21, after the landmark case in *Maneka Gandhi*<sup>5</sup> followed by *Sunil*

1. Modern Law Review, Vol. 42 p. 469.

2. *Wolf v. Mc Donnell*, 418 US 539.

3. (1979) 2 WLR 42.

4. The Modern Law Review Vol. 42, (1979) p. 468-70.

5. (1978) 1 SCC 248 : 1978 SC 597.



*Batra's case*<sup>1</sup> is the sanctuary of human values, prescribes fair procedure and forbids barbarities, punitive or processual.

Handcuffing is *prima facie* inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Article 21.<sup>2</sup>

In *Prem Shanker v. Delhi Administration*,<sup>3</sup> Krishna Iyer, J. said. "We lay down as necessarily implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralising to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safe-keeping." Now whether handcuffs or other restraint should be imposed on a prisoner is primarily a matter for the decision of the authority responsible for his custody. It is a judgment to be exercised with reference to each individual case. It is for that authority to exercise its discretion, and I am not willing to accept that the primary decision should be that of any other. The matter is one where the circumstances may change from one moment to another, and inevitably in some cases it may fall to the decision of the escorting authority midway to decide on imposing a restraint on the prisoner. "I do not think that any prior decision of an external authority can be reasonably imposed on the exercise of that power. If it is a constitutional mandate that no prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort and this was declared to be the law—the distinction between classes of prisoners become constitutionally obsolete. Apart from the fact that economic and social importance cannot be the basis for classifying prisoners for purposes of handcuffs or otherwise, how could it be assumed that a rich criminal or under-trial was any different from a poor or pariah convict or under-trial in the matter of security risk? An affluent in custody may be as dangerous or desperate as an indigent, if not more. He may be more prone to be rescued than an ordinary person. It would be arbitrary and irrational to classify prisoners for purposes of handcuffs, into 'B' class and ordinary class. No one shall be fettered in any form based on superior class differentia, as the law treats them equally. It is brutalising to handcuff a person in public and so is unreasonable to do so. Of course, the police escort will find it comfortable to fetter their charges and be at ease but that is not a relevant consideration."

The heavy deprivation of personal liberty must be justifiable as reasonable restriction in the circumstances. Ignominy, inhumanity and affliction, implicit in chains and shackles are permissible, as not unreasonable, only if every other less cruel means is fraught with risks or beyond availability. So it is that to be consistent with Articles 14 and 19 handcuffs must be the last refuge, not the routine regimen. If a few more guards will suffice, then no handcuffs. If a close watch by armed policemen will do, then no handcuffs. If alternative measures may be provided, then no iron bondage. This is the legal norm.<sup>4</sup>

1. 1978 SC 1675.

2. *Prem Shanker v. Delhi Administration*, 1980 SC 1535 (1541).

3. 1980 SC 1535.

4. 1980 SC 1547, para 41.

### 15.13. Article 21—Right to engage Lawyer.

It is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require.<sup>1</sup>

Every State Government will take prompt steps to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and every State Government ought to try to avoid such a possible eventuality.<sup>2</sup>

It is now well settled, as a result of the decision of the Supreme Court in *Maneka Gandhi v. Union of India*<sup>3</sup> that a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. The Court pointed out in *M. H. Hoskot v. State of Maharashtra*.<sup>4</sup> "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law." Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. Black, J. observed in *Gideon v. Wainwright*.<sup>5</sup>

"Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person held into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning State and national constitutions and laws have laid great emphasis on the procedural and substantive

1. *Hussainarakhatoon v. State of Bihar*, 1979 SC 1377 (1380).

2. *Ibid.*

3. (1978) 1 SCC 248 : 1978 SC 597. quoted in 1979 SC 1369 (1373).

4. (1978) 3 SCR 544 : 1978 SC 1548.

5. (1963) 372 US 335 : 9 L ed 2d 799. quoted in 1979 SC 1369 (1373).

safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

#### 15.14. *Right to Legal Aid.*

The philosophy of legal aid as an inalienable element of fair procedure is evident from Mr. Justice Brennan's<sup>1</sup> well known words : "Nothing rankless more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."<sup>2</sup>

More recently, the U. S. Supreme Court, in *Raymond Hamlin*<sup>3</sup> has extended this processual facet of poverty Jurisprudence, Douglas, J. there explicated : "The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect".

The widespread insistence on free legal assistance, where liberty is in jeopardy, is obvious from the Universal Declaration of Human Rights:

"Art. 8. Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted by the Constitution or by law".

Article 14 (3) of the International Covenant on Civil and Political Rights guarantees to everyone : "the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it."

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed.....The court should consider the individual factors peculiar to each case. These of course, would

1. Legal Aid and Legal Education, p. 94.

2. *Hoskot v. State of Maharashtra*, 1978 SC 1548 (1555).

3. 32 L ed. 2d. 530 (535) ; 1978 SC 1548.

be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case.<sup>1</sup>

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.<sup>2</sup>

The Supreme Court pointed out in *Hussainara Khatoon's*<sup>3</sup> case that the right to free legal services is clearly an essential ingredients of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though the Supreme Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence.

The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the Court in *Rhem v. Malcolm*.<sup>4</sup> "the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Blackmun, J., in *Jackson v. Bishop*,<sup>5</sup> "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations." Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time".

#### 15.15. Right of a detenu to consult a legal adviser.

The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously include in the

1. *Jon Richard Argersinger v. Raymond Hamlin*, 407 US 25 : 32 L ed 2nd 530 (535-36) and 554 : *Hussainara-Khatoon v. State of Bihar*, 1979 SC 1369 (1374).

2. Directive Principles Art 39 A.

3. 1979 SC 1369 quoted in *Khatri v. State of Bihar*, 1981 SC 928 (930).

4. 377 F Supp. 995, quoted in 1981 SC 931.

5. 404 F Supp. 2d, 571, quoted in 1981 SC 931.

right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21.<sup>1</sup>

In *Francis Coralie v. Union Territory*,<sup>2</sup> the legal adviser under the rules could have interview with the detenu only by prior appointment after obtaining the permission of the District Magistrate. The Supreme Court held that the rule regulating the right of a detenu to have interview with a legal adviser of his choice was violative of Articles 14 and 21 and as such unconstitutional and void. It would be quite reasonable if a detenu were to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. The interview need not necessarily take place in the presence of a nominated officer of Customs/Central Excise/Enforcement but if the presence of such officer can be conveniently secured at the time of interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other Jail official may, if thought necessary, watch the interview but not so as to be within hearing distance of the detenu and the legal adviser.

#### 15.16. Marriage—Personal liberty, Procreation of children

What more important personal right could there be in a citizen than that to determine in marriage his attitude and resolve his mode of life concerning the procreation of children? Whist 'personal rights' are not set out specifically, it is scarcely to be doubted that in our society the right to privacy is universally recognised and accepted with possibly the rarest of exceptions and the matter of marital relationship must rank as one of the most important of matters in the realm of privacy.<sup>3</sup>

The individual has natural and human rights over which the State has no authority and the family as the natural primary and fundamental unit group of society has rights as such which the State cannot control. At the same time, however, it is true that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society.<sup>4</sup>

Fourteenth Amendment of the American Constitution provides that no State shall deprive any person of *life liberty or property* without due process of law. Art 21 is almost in the same terms. The only difference is that Art. 21 uses the expression in place of "due process of law." In place of liberty, Art 21 has used the expression *personal liberty* but it makes no difference.

Right to Property was protected as a Fundamental right. Now it is protected under Article 300-A.

1. 1981 SC 754.
2. 1981 SC 746 (753-54).
3. CCL Cases, p. 401.
4. CCL Cases, p. 399-409.

The U.S. Supreme Court considered the meaning of liberty in *Myer v. Nebraska*,<sup>1</sup> while this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been deliberately stated without doubt, it denotes not merely freedom from bodily restraints but also the right of the individual to contract, to engage in any of the common occupation of life to acquire useful knowledge to marry, establish a home to bring up children to worship God to the dictates of his own conscience and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness of free men.

Our Constitution has specifically named freedom of liberties but it is impossible to enumerate all liberties and therefore Art. 21 was enacted as a sort of residuary article protecting all liberties which a person might need to secure happiness. It is submitted and all the expression personal liberty should be construed more liberally.

The United States Supreme Court in numerous decisions have recognised a right of privacy guaranteed by the Fourteenth Amendment personal rights that can be deemed fundamental or implicit in the concept of ordered liberty. This privacy right encompasses and protects the personal intimacies of the home, the family marriage, motherhood procreation and child rearing.<sup>2</sup>

### *Rights of Parents.*

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide : "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child nor any child his parent.....The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter ; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be". In order to submerge the individual and develop ideal citizens. Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest ; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.<sup>3</sup>

In *Meyer v. Nebraska*<sup>4</sup> Meyer was charged for teaching subjects in the German language to a child of ten years in breach of the provisions of the Act relating to the teaching of foreign languages in the state of Nebraska. The challenged statute forbade the teaching in School of any subject except in English also the teaching of any other languages until the pupil had successfully passed the eighth grade which was not usually accomplished

1. 67 L ed 1042.

2. *Paris Adult Theatre v. Staton*, 37 L ed 2d 446 462 ; *Griswold Connecticut*, 14 L ed 2d 510 ; *Prince v. Massachusetts*, 88 L ed 645 ; *Pierce v. Society of Sisters*, 69 L ed 1070 ; *Meyer v. Nebraska*, 67 L ed 1042.

3. *Meyer v. State of Nebraska*, 67 L ed 1042 (1046).

4. *Ibid.* p. 1046.

before the age of twelve. The Supreme Court held that "the protection of the constitution extends to all those who speak other languages as well as to those born with English on the tongue and the statute as applied was arbitrary, and without reasonable relation to any end the competency of the state.

An Oregon statute of 1922 required that every parent, guardian of a child between eight and sixteen years to send him "to a public School. The validity of the statute was challenged in *Pierce v. Society of Sisters of Holy Names*.<sup>1</sup>

Mc. Reynods, J., speaking for the court said : "Under the doctrine of *Meyer v. Nebraska*<sup>2</sup>, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all Governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state ; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations".<sup>3</sup>

The State recognises the parents as the natural guardians of the children of the family and as those in whom the authority of the family is vested and those who shall have the right to determine how the family life shall be conducted having due regard to the rights of children..... It is a matter exclusively for the husband and wife to decide how many children they wish to have. Husband and wife have a correlative right to agree to have no children. What may be permissible to the husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practise either, total or partial abstinence in their sexual relations. If the State were to attempt to intervene to compel such abstinence it would be an intolerable and justifiable intrusion into the privacy of the matrimonial bedroom. On the other hand, any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the guaranteed rights of the human life in question.<sup>4</sup>

The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy.....The question of whether the use of contraceptives by married couples within their marriage is or is not contrary to the moral code or codes to which they profess.....could not justify State intervention. Similarly the fact that the use of contraceptives may offend against the moral code of the majority of the citizens of the State would not per se justify an intervention by the State to prohibit their use within marriage. The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common goods requires it. If this right (of marital privacy) cannot be directly invaded by the State it follows that it cannot be frustrated by the State's taking measures to ensure that the exercise of that right is rendered impossible. State may be justified

1. 69 L ed 1070.

2. 67 L ed 1042 (1046).

3. *Pierce v. Society of Sisters of Holy Names*, 69 L ed 1071 (1078).

4. CCL Cases, p. 401.

in a case where the public good requires it, as for example a dangerous fall in population threatening the life or the essential welfare of the State, to take such steps to ensure that in general that even if married couples could not be compelled to have children they could at least be hindered in their endeavours to avoid them.<sup>1</sup>

Similarly in the case of over-population the State may not be denied the right to resort to family planning.

Justice Harlan's dissenting opinion in *Poe v. Ullman*<sup>2</sup> stated that the thesis : "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property ; the freedom of speech, press, and religion ; the right to keep and bears arms ; the freedom from unreasonable searches and seizures ; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what certain interests requires particularly careful scrutiny of the state needs to justify their abridgement." The history of the framing and ratification of the Constitution and of the Bill of Rights leaves little doubt about the correctness of Justice Harlan's proposition. Indeed, James Madison introduced the ninth amendment in specific response to the arguments of Hamilton and others that enactment of a Bill of Rights might dangerously suggest "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure."

The case of *Griswold v. Connecticut*<sup>3</sup> presented the question whether a married couple could be sent to jail by the State of Connecticut for using contraceptive s.

The Court held that Connecticut's law was unconstitutional. Justice Douglas' opinion for the Court relied on "the zone of privacy created by several fundamental constitutional guarantees," explaining that "specific guarantees in the Bill of Rights"—he was referring to the first, third, fourth, and ninth—"have penumbras, formed by emanations from those guarantees that help give them life and substance."

Physical survival is certainly as "indisposeable" to the enjoyment of other freedoms as are speech or voting. One must be able to express oneself to protest the violation of other rights, but to express oneself one needs at least a decent level of nourishment, shelter, clothing, medical care, and education. To have those things, one needs either employment or income support. Too easily government may purchases the silent acquiescence of the deprived in their own constitutional undoing. People who cannot buy bread cannot follow the suggestion that they eat cake ; people bowed under the weight of poverty are unlikely to stand up for their constitutional rights.

The day may indeed come when a general doctrine under the fifth and fourteenth amendments recognizes for each individual a constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, work and schooling.

1. C. C. L. Cases, p. 400.

2. 367 US 497 : 62 L ed 2d 989 (1019).

3. 381 US 479 : 14 L ed 510 (514) quoted in Tribe's American Constitutional Law p. 569-574).



But despite straws in the wind and strands of doctrine pointing in this general direction, that time has not yet come, and constitutional lawyers must continue to struggle with less sweeping solutions and more tentative doctrinal tools.<sup>1</sup>

**15.18. Article 21 and Section 302 I. P. C.—Guidelines for inflicting capital punishment.**

The Supreme Court in *Bachan Singh v. State of Punjab*,<sup>2</sup> by a majority judgment rejected the challenge to the constitutionality of the impugned provisions contained in Section 302 Indian Penal Code and 354 (B) of the Code of Criminal Procedure. It was, however, observed that a “real and abiding concern for the dignity of human life postulates resistance to taking a life through laws’ instrumentalities. That ought not to be done save in the rarest of rare cases.

Justice Bhagwati, J., in a separate judgment expressed his view that he would strike down Section 302 as unconstitutional and void in so far as it provides for imposition of death penalty as an alternative to imprisonment for life.

In *Rajendra Prasad v. State of U. P.*<sup>3</sup> V. R. Krishna Iyer, J. observed : “The main focus of our judgment is on this poignant gap in ‘human rights jurisprudence’ within the limits of the Penal Code, impregnated by the Constitution. To put it pithily, a world order voicing the worth of the human person, a cultural legacy charged with compassion, an interpretative liberation from colonial callousness to life and liberty, a concern for social justice as setting the sights of individual justice, interest with the inherited tax of the Penal Code to yield the goals desiderated by the Preamble and Articles 14, 19 and 21.”

According to Kailasam, J., the challenge to the award of the death sentence as violative of Arts. 19, 14, and 21, was repelled by the Constitution Bench in *Jagmohan’s*<sup>4</sup> case.

**15.19. Vaccination—Public Health etc.**

To safeguard the public health, safety, welfare a moral is one of the most basic of the governmental powers. Yet its exercise always raises serious questions because that exercise invariably involves a clash between the rights that are fundamental to a society. Can Government prevent to spreading all epidemics by requiring all persons, regardless of religious scruples or dangerous to their own health, to submit to their vaccination ? Can Government protect against protectiveness and drug addiction by prohibiting the sale of liquors, breweries, hard narcotics etc ? Can Government protect the life of a woman to control her own body ? Can Government protect morals by forbidding sale of devices that prevent conception ? Can Government protect morals by out laying homosexual relations between consenting adults or hetrosexual relations between unmarried person. Can the State grant against the spread of mental illness, crime or poverty by feeble minded habitual criminals or those who seems genetically unable to cope in society to submit to sterilization ? Can the Government force sterilization of married people in order to check the growth of population ? To what length can

1. Lawrence H. Tribe...American Constitutional Law, p. 574.

2. 1980 SC 898.

3. (1979) 3 SCR 78 : 1979 SC 916.

4. 1973 SC 947.

Government go to obtain evidence against criminals to punish those convicted of crime like a rape and murder.

Our Constitution does not provide explicit help in resolving these kinds of problems, but for liberal democratic society after all has a real and fundamental interest in protecting individual liberty as well as public health, morals and safety. Indeed the very notion of a written constitution and Judicial review indicates that the governmental or even majoritarian concept of what public demand should be, does not automatically take precedence over individual liberty. Moreover, the dignity of a man forms one of the fundamental principles on which Constitutional democracy is granted.

#### 15.20. *When Bail to be given.*

The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even handed and geared to the goals of community good and State necessity spelt out in Art. 19. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice to the individual involved and society affected. "We must weigh" said Krishna Iyer, J., "the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, community roots of the applicants are stressed. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and policy favouring release justly sensible."<sup>1</sup>

Thus conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution.<sup>2</sup>

A circumstance of some consequence, when considering a motion for bail, is the period in prison already spent and the prospect of the appeal being delayed for hearing. The delicate light of the law favours release unless countered by the negative criteria necessitating that course. The corrective instinct of the law plays upon release orders by strapping on to them protective and curative conditions. A heavy bail from a poor man is obviously wrong. Poverty is society's malady and sympathy, not sternness, is the judicial response. The Judge further said: "So long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily unless there are cogent grounds for acting otherwise release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."<sup>3</sup>

#### 15.21. *To Keep in jail for indefinite period.*

To put a man in prison and forget his personhood thereafter, to deprive a man of his personal liberty for an arbitrary period without monitoring by

1. *Babu Sing v. State of U. P.*, 1978 SC 527 (531):

2. *Ibid.*, p. 531.

3. *Ibid.*, p. 632.

the law, to put a man in continued custody unmindful of just fair and reasonable procedure—these shake the faith of the rule of law and militate against the mandates of Part III of the Constitution.<sup>1</sup>

### 15.21. Punishment.

Punishment is a matter of Penal policy in constitutionality and so it is in a sense out of bounds for judicial advice. If a sentence is prescribed as a mandatory minimum, and that is too cruel to comport with Article 21 and that too tortuous to be reasonably justifiable or socially defensible under Art. 19 then a case for judicial review may arise.<sup>2</sup>

### 15.22. Death Sentence.

In *Jagmohan Singh v. State of U. P.*,<sup>3</sup> the question of constitutional impermissibility of the death sentence for murder was considered. Palekar, J. speaking for the court said : “Not a few are found to hold that life imprisonment, especially, as it is understood in U S. A. is cruel. On the other hand, capital punishment cannot be described as unusual because that kind of punishment has been with us from ancient times right upto the present day though the number of offences for which it can be imposed has continuously dwindled. The framers of our Constitution were well aware of the existence of capital punishment as a permissible punishment under the law.”

The Constitution-makers had recognised the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the like. But more important than these provisions in the Constitution is Article 21 which provides that no person shall be deprived of his life except according to procedure established by law. The implication is very clear. Deprivation of life is constitutionally permissible if that is done according to procedure established by law. In the face of these indications of constitutional postulates it will be very difficult to hold that capital sentence was regarded per se as unreasonable or not in the public interest.<sup>4</sup>

The question was considered by a Bench of three Judges, Aiyer, D. A. Desai and Kailasham, JJ. in *Rajendra Prasad's case*.<sup>5</sup> In this case the majority (Aiyer & Desai, JJ.) opined :

“The only correct approach is to read into Section 302, I. P. C. and Section 354 (3), Cr. P. C., the human rights and humane trends in the Constitution. So examined, the right to life and the fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled.”

It is constitutionally permissible to swing a criminal out of corporal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19 (2) to (6).<sup>6</sup>

Kailashan, J., dissented and followed *Jagmohan Singh's case*.

1. *Mantoo Majumdar v. State of Bihar*, 1980 SC 845 (848).
2. *Inderjeet Singh v. State U.P.*, 1979 S C 1867 (1868) obiter.
3. 1973 SC 947(952).
4. 1973 SC 947 (952).
5. (1979) 3 SCR 646 : 1979 C 916.
6. 1980 SC 904.

In *Bachan Singh v. State of Punjab*,<sup>1</sup> the question about the constitutionality of Section 302 Indian Penal Code was considered by a Bench of five Judges (Chandrachud, C. J., Bhagwati, Sarkaria, Gupta and Untwalia, JJ.). The majority judgment was delivered by Sarkaria, J. The Supreme Court, rejected the challenge to the constitutionality of Section 302 Penal Code and 354 (3) of the Code of Criminal Procedure. Bhagwati, J. dissenting said : "I am of the view that Section 302 of the Indian Penal Code in so far as it provides for imposition of death penalty as an alternative to life sentence is *ultra vires* and void as being violative of Articles 14 and 21 of the Constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.

I would therefore strike down Section 302 as unconstitutional and void in so far as it provides for imposition of death penalty as an alternative to imprisonment for life.<sup>2</sup>

In *Sher Singh v. State of Punjab*,<sup>3</sup> Chandrachud, C. J. speaking for the Court (3 Judges) said: "Death sentences is constitutionally valid and permissible within the constraints of the rule in *Bachan Singh* (*supra*). This has to be accepted as the law of the land. We do not all of us share the views of every one of us. And that is natural because every one of us has his own philosophy of law and life, moulded and conditioned by his own assessment of the performance and potentials of law and the garnered experience of life. But the decisions rendered by this Court after a full debate have to be accepted without mental reservations until they are set aside".

### 15.23. Execution of Death Sentence

The fact that it is permissible to impose the death sentence in appropriate cases does not lead to the conclusion that the sentence must be executed in every case in which it is upheld, regardless of the events which have happened since the imposition or the up holding of that sentence.

A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this Court for examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Art. 21 of the Constitution. The horizons of Art. 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Art. 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable. It is well-established that a prisoner cannot be tortured or subjected to unfair or inhuman treatment. It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair. Art. 21 stands like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fairplay. That voice can never be silenced on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberates through all stages

1. 1980 SC 898.

2. *Bachan Singh v. State of Punjab*, 1980 SC 898 (945).

3. 1983 SC 465 (469).

—the trial, the sentence, the incarceration and finally. the execution of the sentence.<sup>1</sup>

### 15.24. *Speedy Trial.*

In cases numerous to mention, the Supreme Court has released undertrial prisoners who were held in jail for periods longer than the period to which they could be sentenced, if found guilty: this jurisdiction relates to pre-trial procedure. In *Hussainara Khatoon* (AIR 1979 SC 1369) and *Champalal* AIR 1981 SC 1675: (1981 Cri LJ 1273), speedy trial was held to be an integral part of the right conferred by Article 21 : this jurisdiction relates to procedure during the trial. In *Prabhakar Pandurang Sanzgiri*, the Court upheld the right of a detenu, while in detention, to publish a book of scientific interest called 'Inside the Atom'; in *Bhuvan Mohan Patnaik*, it was held that prisoners had to be afforded reasonable human conveniences and that the live-wire mechanism fixed on prison-walls in pursuance of administrative instructions could not be justified as reasonable if it violated the fundamental rights of the prisoners ; in *Sunil Batra*, solitary confinement and bar-fetters were disapproved as normal modes of securing prisoners. There three cases are illustrative of the Court's jurisdiction to review prison regulations and to regulate the treatment of prisoners while in jail.

In *Sher Singh* case, (supra) Chandrachud, C. J. speaking for the Court said : "Prolonged delay in the execution of a death sentence in unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But, according to us no hard and fast rule can be laid down as our learned Bretheren have done that "delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Art. 21 and demand the quashing of the sentence of death". This period of two years purports to have been fixed in *Vatheeswaran* after making "all reasonable allowance for the time necessary for appeal and consideration of reprieve". With great respect, we find it impossible to agree with this part of the judgment. One has only to turn to the statistics of the disposal of cases in the High Court and the Supreme Court to appreciate that a period far exceeding two years is generally taken by those Courts together for the disposal of matters involving even the death sentence. Very often, four or five years elapse between the imposition of death sentence by the Sessions Court and the disposal of the Special Leave Petition or an Appeal by the Supreme Court in that matter. This apart from the time which the President or the Governor, as the case may be, takes to consider petitions filed under Article 72 or Art. 161 of the Constitution or the time which the Government takes to dispose of applications filed under Sections 432 of 433 of the Code of Criminal Procedure. It has been the sad experience of Courts that no priority whatsoever is given by the Government of India to the disposal of petitions filed to the President under Article 72 of the Constitution. Frequent reminders are issued by the Supreme Court for an expeditious disposal of such petitions but even then petitions remain undisposed of for a long time. Seeing that the petition for reprieve or commutation is not being attended to and no reason is forthcoming as to why the delay is caused, the Supreme Court is driven to commute the death sentence into life imprisonment out of a sheer sense of helplessness and frustration. Therefore, with respect the fixation of the time limit of two years does not seem to us to accord with the common experience of the time

1. *Sher Singh v. State of Pmjab*, 1983 SC 465 (470).

2. *Sher Singh State of Punjab*, 1983 SC 465 (479).

3. *Ibid.*, p. 470.

normally consumed by the litigative process and the proceedings before the executive.”<sup>1</sup>

### 15.25. *Prison Justice & Courts.*

The axiom of prison justice is the Court's continuing duty and authority to ensure that the judicial warrant which deprives a person of his life or liberty is not exceeded, subverted or stultified. It is a sort of solemn covenant running with the power to sentence where a prison practice or internal institution places harsh restriction on jail life, breaching guaranteed rights the Court directly comes in every prison sentence is a conditioned deprivation of life and liberty with civilized norms built in unlimited trauma interdicted. “In this sense” Krishna Iyer, J. said : “judicial policing of prison practices is implied in the sentencing power. The criminal judiciary have thus a duty to guardian their sentences, and visit the prison when necessary.”<sup>2</sup> Deterrence both specific and general, rehabilitation and institutional security are a vital consideration. Compassion where ever possible and cruelty only where inevitable is the art of correctional confinement. When prison policy advances such a valid goal, the Courts will not interfere. True, the judge said ‘confronted with cruel conditions of confinement, the court has an expanded role. True the right to life is more than mere animal existence or vegetable subsistence. True the worth of the human person and dignity and divinity of every undividual inform Arts. 19 and 21 even in a prison setting. True constitutional provisions and municipal laws must be interpreted in the light of normative laws of nations, wherever possible and a prisoner does not forfeit his Part III rights.’<sup>3</sup>

### 15.26. *Burden of Proof.*

Where does the burden of proof be when the challenge to a law enacted by the legislature is based on violation of Art. 21. Wherever there is deprivation of life, and by life it not not only physical existence, but also use of any faculty or limb through which life is enjoyed and basic human dignity or of any aspect of personal liberty the burden must rest on the State to establish by producing adequate material or otherwise that the procedure prescribed for such deprivation is not arbitrary but is reasonable, fair and just.

Throwing the burden of proof of reasonableness, fairness and justness on the State in such a case is a homage which the Constitution and the court must pay to the right to life. It is significant to point out that even in case of State action depriving a person of his personal liberty, the Supreme Court has always cast the burden of proving the validity of such action on the State, when it has been challenged on behalf of the person deprived of his personal liberty.<sup>4</sup>

1. *Sher Singh v. State of Punjab*, 1983 SC 465 (470).
2. *Charles Sobraj v. Suptt. of Central Jail*, 1978 SC 1514 (1516).
3. *Ibid.* p. 1517
4. 1982 SC 1350 para 33.

## Protection against arrest and detention

### SYNOPSIS

- 16.1. Liberty of subject and arrest.
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### 16.1 *Liberty of subject and arrest*

The liberty of the subject and the convenience of the police or any other executive authority is not to be weighed in the scales against each other. A man is not to be deprived of his liberty except in due course and process of law. It is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. It is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful.<sup>1</sup>

The arrested man is entitled to be told what is the act for which he is arrested. This is the fundamental principle that a man is entitled to know what are the facts alleged to constitute crime on his part.<sup>2</sup>

### 16.2. *What constitutes arrest.*

There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time, when it was held that there could be no lawful arrest unless there was an actual seizure or touching. It is quite clear that that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided of course that the accused submits and goes with the police officer. Equally it is clear that an arrest is constituted when any form of word is used which, in the circumstances of the case, were, calculated to bring to the accused's notice and did bring to the accused's notice, that he was under compulsion and thereafter he submitted to that compulsion.<sup>3</sup>

The arrest must be in connection with any allegation or accusation of any actual or suspected or apprehended commission of an offence of a criminal or quasi criminal nature.

### 16.3. *Arrest in two categories.*

Broadly speaking, arrests may be classified into two categories, namely, arrests under warrant issued by a court and arrests otherwise than under such warrants. The language of Art. 22 (1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a court on the allegations or accusation

1. *Christie v. Leachinstry*, (1971) 1 All. E. R. 567 (576) (575).

2. *Ibid.*

3. *Alderson v. Booth*, (1969) 2 All. E. R. 271 (273).



that the arrested person has, or is suspected to have, committed or is about or likely to commit an act of a criminal or quasi criminal nature or some activity prejudicial to the public or the State interest. In other words there is indication in the language of Art. 22 (1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority. In the *Blitz* case the arrest was made on a warrant issued, not by a court, but by the speaker of a State Legislature.<sup>1</sup>

Arrests without warrants issued by a Court call for greater protection than arrests under such warrants. The provision that the arrested person should within 24 hours be produced before the nearest Magistrate, is particularly desirable in the case of arrests otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a Court, the judicial mind has already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production a matter of a substantive fundamental right.

In *State of Punjab v. Ajaib Singh, Das, J.*, said :

“Whatever else may come within the purview of Art. 22 (1) and (2), suffice it to say for the purposes of this case, that we are satisfied that the physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest and delivery of that person to the custody of the officer in charge of the nearest camp under Sec. 4 of the impugned Act cannot be regarded as arrest and detention within the meaning of Art. 22 (1) and (2).”<sup>2</sup>

#### 16.4. Power to arrest.

Any police officer may, without an order from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any cognizable offence.<sup>3</sup>

Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete, it is ready for trial and passes on to its next stage. Reasonable suspicion has not been equated with *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all.<sup>4</sup> The protection of the public is safeguarded by the requirement that the constable before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called before acting to have any thing like a *prima facie* case for conviction.<sup>5</sup>

1. *State of Punjab v. Ajaib Singh*, 1953 S. C. 10 (15).

2. *Ibid* p. 15.

3. Criminal Procedure Code, Sec. 41.

4. *Shaaban Bin Hussien v. Chong Fook Kam*, (1969) 3 All E. R. 1626 (1630-3).

5. *Dumbell v. Roberts*, (1944) 1 All E. R. 326 (329) per Scott.

It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors. There is no serious danger in a large measure of executive discretion in the first instance because the discretion is subject indirectly to judicial control. There is first the power to grant bail.<sup>1</sup>

The Criminal Procedure Code requires every police officer arresting any person without warrant to communicate to him forthwith full particulars of the offence for which he is arrested or other grounds for such arrest<sup>2</sup> (b) to take or send without unnecessary delay before a Magistrate, having jurisdiction in the case or before the Officer in-charge of Police Station.<sup>3</sup> The Code further enjoins the Police Officer not to detain in custody for a longer period than under the circumstances of the case, is reasonable and such period shall not, in the absence of a special order of a Magistrate under Sect. 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.<sup>4</sup>

#### 16.5: How Constitution protects arrest

Our Constitution gives protection against arrest. No person except an alien enemy<sup>5</sup> or a person who is arrested or detained under any law providing for preventive detention<sup>6</sup> who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his own choice.<sup>7</sup> Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate, and no such person shall be detained in custody beyond the said period without the authority of Magistrate.<sup>8</sup>

The Criminal Procedure Code contains analogous provisions but our Constitution makers were anxious to make these safeguards as an integral part of fundamental rights. Dr. Ambedkar while moving for insertion of Article 15-A in the draft Constitution which corresponds to Article 22 said : "Article 15-A merely lifts from the provision of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code and thereby it might be said that we are really not making any necessary fundamental change. But we are, making a fundamental change because what we are doing by the introduction of Art. 15-A is

1. *Shaban Bin Hussien v. Chong Fook Kam*, (1969) 3 All. E. R. 1626 (1630).
2. Section 50.
3. Section 56.
4. Section 57.
5. *Constitution of India*, Art. 22 (3) (a).
6. *Constitution of India*, Art. 22 (3) (b).
7. *Constitution of India*, Art. 22 (1).
8. *Constitution of India*, Art. 22 (2).

to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions, because they are now introduced in our Constitution itself." The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake misapprehension or misunderstanding in the minds of the arresting authority, and also to know exactly what the accusation against him is so that he can exercise the second right, namely of consulting a legal practitioner of his choice, and to be defended by him. Clause (2) of Art. 22 provides the next and most integral safeguard that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply its mind to his case. In *Madhu Limaye's*<sup>1</sup> case the Supreme Court ordered the release of Madhu Limaye and other arrested person as there was non-compliance of the provisions of Art. 22 (1) of the Constitution. The return filed by the State did not contain any information as to when and by whom Madhu Limaye and others were informed of the grounds for their arrest. It was also not contended by the State that the circumstances were such that the arrested persons must have known the general nature of the alleged offences for which they had been arrested.<sup>2</sup>

#### 16.6. Freedom from arrest.

An examination of the common law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the framers of the Amendment of the United States Constitution might have thought to be reasonable. Initially, it should be noted that the common law rules of arrest developed in legal contexts that substantially differ from the cases now before us. In these cases, which involve application of the exclusionary rule, the issue is whether certain evidence is admissible at trial.<sup>3</sup> See *Weeks v. United States*.<sup>4</sup> At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense. See, e.g. *Leach v. Money*.<sup>5</sup> Additionally, if an officer was killed while attempting to effect an arrest, the question whether the person resisting the arrest was guilty of murder or manslaughter turned on whether the officer was acting within the bounds of his authority. See *M. Foster, Crown Cases*.<sup>6</sup> See also *West v. Cabell*.<sup>7</sup>

#### 16.7. Defence by own Counsel

The Indian Constitution lays down in absolute terms a right to be defended by one's own counsel. Art. 22 (1) declares that no person who is arrested, shall be detained in custody.....nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice. Is the right to be defended by a legal practitioner conferred only on a person arrested? Sarkar, C. J. and Madholkar, J, said "that this right extended also to a case of defence in a trial which may result in the loss of personal liberty." They interpreted the words "nor shall he" as not being confined to a person who has been presently arrested but also as including a person who though not arrested runs the risk of loss of personal liberty. They also laid that a person arrested would not

1. *Madhu Limaye In re*, 1969 S. C. 1014 (1018).

2. *Ibid.*, p. 1019.

3. *Payton v. New York*, 63 L ed. 2d p. 653-4.

4. 232 US 383 : 58 L ed 652 : 34 S Ct 341.

5. 1 How St Tr 1001 : 97 Eng Rep 1075 KB 1765.

6. 308, 312 1762.

7. 153 US 78 : (85) : 38 L ed 643, 14 S Ct 752.

have the right to be defended by a legal practitioner at a trial which would not result in the deprivation of his personal liberty. Bachawat and Shelat, JJ. took the view that Art. 22 safeguards the rights of the person arrested on the accusation of a crime for which he is arrested and this right attaching to him on the arrest continued though he may not be under detention at the time of the trial. The right was not lost because he was released on bail. This right to be defended by counsel according to their Lordships was not limited to a trial in which the arrested person was in jeopardy of being sentenced to death or to a term of imprisonment. Hidayatullah, J. agreed with Bachawat and Shelat, JJ. The word "defended" according to him included the exercise of the right so long as the effect of arrest continues. Before his release on bail the person defends himself against his arrest and the charge for which he is arrested and after his release on bail, against the charge he is to answer.<sup>1</sup>

Personal liberty is invaded by arrest and continues to be restrained during the period a person is on bail and it matters not whether there is or is not a possibility of imprisonment.<sup>2</sup>

The Constitution only gives the right to the accused to be defended by a legal practitioner of his own choice. Section 340 of the Criminal Procedure Code provides that any person accused of an offence before a criminal court may of right be defended by a pleader. This right does not extend to a right in an accused person to be provided with a lawyer by the State, or by the police or by the Magistrate.<sup>3</sup> The privilege conferred by this provision only gave right to an accused to be represented by a counsel if he wanted to engage one himself or to get his relations to engage one for him.<sup>4</sup>

#### 16.8. Preventive Justice and Punitive Justice.

Preventive Justice, consists in restraining a man from committing a crime which he may commit but has not yet committed, or doing some act injurious to members of the community which he may not but has not yet done. In almost every case where preventive justice is put in force, some suffering and inconvenience may be caused to a suspected person. That is inevitable. But the suffering is inflicted for something much more important than his liberty or convenience namely, for securing the public safety and defence of the realm.<sup>5</sup>

As preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable that he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.<sup>6</sup> Preventive detention is not punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. Justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence.<sup>7</sup> Preventive detention is devised to afford pro-

1. *State of Madhya Pradesh v. Shobharam*, (1966) Supp. S. C. R. 239 (255, 25.) : 1966 S. C. 1910 (1921).

2. *Ibid.*, p. 249, 251 : 1966 S. C. 1910 (1917).

3. *Tara Singh v. The State*, 1951 S. C. 729 : 1951 S. C. R. 441 (443). (Case under Sect. 340 Cr. Pro. Code).

4. *Bashira v. State of U. P.*, 1969 (1) S C R 32 (36) : 1968 S. C. 1313 (1316)

5. *R. v. Holiday Exp. Zadig*, 1917 A. C. 260 (273) : 86 L. J. K. B. 1119 (1127).

6. *Ibid.*, p. 275.

7. *A. K. Gopalan v. State of Madras*, 1950 S. C. R. 88 (249) : 1950 S. C. 27 (92) per Mukherjee, J.

tection to society. Any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State.<sup>1</sup>

It is necessary to bear in mind the distinction between 'preventive detention' and 'punitive detention', when we are considering the question of validity of conditions of detention. There is a vital distinction between these two kinds of detention. 'Punitive detention' is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while 'preventive detention' is not by way of punishment at all, but it is intended to prevent a person from indulging in conduct injurious to the society. The power of preventive detention has been recognised as a necessary evil and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. It is a drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in times of war or aggression.<sup>2</sup>

Our Constitution does recognise the existence of this power, but it is hedged in by various safeguards set out in Articles 21 and 22. Article 22 in clauses (4) to (7), deals specifically with safeguards against preventive detention and any law of preventive detention or action by way of preventive detention taken under such law must be in conformity with the restrictions laid down by those clauses on pain of invalidation. But apart from Article 22, there is also Article 21 which lays down restrictions on the power of preventive detention.<sup>3</sup>

#### 16.9. Article 22 (4).

Article 22 (4) of the Constitution provides that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been or are qualified to be appointed as, Judges of a High Court, has reported before the expiration of the said period of three months that there is in its opinion sufficient case for such detention.

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause, (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).<sup>4</sup>

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.<sup>5</sup>

Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.<sup>6</sup>

1. *R. v. Holiday Exp. Zadig*, 1917 A. C. 260 per Lord Finlay.

2. *Francis Coralle v. Union Territory of Delhi*, 1981 S. C. 746 (749).

3. *Francis Coralle v. Union Territory*, 1981 SC 746 (749).

4. *Constitution of India*, Art. 22 (1).

5. *Constitution of India*, Art. 22 (5).

6. *Constitution of India*, Art. 22 (6) proviso.

Parliament may by law prescribe :—(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ; (b) the maximum period for which any person may in any class or classe of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).<sup>1</sup>

#### 16.10. Constitutional validity of Preventive Detention Act

The Constitution permits the Parliament and the State Legislature to enact Preventive Detention Acts under Entry 9 of the Union List. The Parliament has power to pass laws relating to Preventive Detention for reasons connected with defence, foreign affairs or the security of India and also in respect of persons subjected to such detention. Both the Parliament and the State Legislatures have under Entry 3 of the Concurrent List power to pass laws in respect of Preventive Detention for reasons connected with the Security of State, the maintenance of public order or the maintenance of supplies and services essential to the community and persons subject to such detention.

The constitutionality of the Preventive Detention Act, 1950 was challenged in *A. K. Gopalan's* case (supra). The Act was held to be valid. Kania, C. J., said "Preventive detention in normal times, i. e. without the existence of an emergency like war, is recognised as a normal topic of legislation in List I, Entry 9 and List III, Entry 3 of Schedule 7. Even in the Chapter on Fundamental Rights, Article 22 envisages legislation in respect of preventive detention in normal times. The provisions of Article 22 (4) to (7) by their very wording leave unaffected the large powers of legislation on point and emphasise particularly by Article 22 (7) the powers of the Parliament to deprive a person of a right to have his case considered by an Advisory Board. Part III and Article 22 in particular are the only restrictions on that power and but for those provisions the power to legislate on the subject would have been quite unrestricted. Parliament could have made a law without any safeguard or any procedure for preventive detention. Such an autocratic supremacy of the legislature is certainly cut down by Article 21."<sup>2</sup>

The law of preventive detention has therefore now to pass the test not only of Art. 22, but also of Article 21 and if the constitutional validity of any such law is challenged, the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. But despite these safeguards laid down by the Constitution and creatively evolved by the Courts, the power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty, which is the most cherished and prized possession of man in a civilised society. It is a power to be exercised with the greatest care and caution and the courts have to be ever vigilant to see that this power is not abused or misused. It must always be remembered that preventive detention is qualitatively different from punitive detention and their purposes are different.<sup>3</sup> In case of punitive detention, the person concerned is detained by way of punishment after he is found guilty of wrong doing as a result of a trial where he has the fullest opportunity to defend himself, while in case of preventive detention, he is detained merely on suspicion with a view to preventing him from doing harm

1. *Constitution of India*, Art. 22 (7).

2. *A. K. Gopalan v. State of Madras*, 1950 SC 27.

3. *Francis Coralie v. Union of India*, 1981 S. C. 740 (750).

in future and the opportunity that he has for contesting the action of the Executive is very limited. Having regard to this distinctive character of preventive detention, which aims not at punishing an individual for a wrong done by him, but at curtailing his liberty with a view to preventing his injurious activities in future, it has been laid down by the Supreme Court in *Sampat Prakash v. State of Jammu and Kashmir*<sup>1</sup> "that the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal".

In *A. K. Gopalan v. State of Madras*<sup>2</sup> the majority court held that Art. 22 of the Constitution was a self contained code and therefore a law of preventive detention did not have to satisfy the requirements of Art. 19, 14 and 21. The view of Fazal Ali J., on the other hand, was that preventive detention was a direct breach of the right under Art. 19 (a) (d) and that a law providing for preventive detention had to be subject to such judicial review as is obtainable under clause (6) of that Article.<sup>3</sup> In *R. C. Cooper v Union of India*<sup>4</sup> the aforesaid premise of the majority in *Gopalan's* case was disapproved. Though *Cooper's* case dealt with the interrelationship of Art. 19 and Art. 31 the basic approach to construing the fundamental rights guaranteed under different provisions of the Constitution adopted in this case, it was held that the major premise of the majority in *Gopalan's* case was incorrect.<sup>5</sup>

In *Hardhan Saha v. State of W.B.*<sup>6</sup> the Supreme Court considered the challenge of Art. 19 to the validity of the Maintenance of Security Act and held that the Act did not violate any of the constitutional guarantee embodied in Art. 19 and was valid. This decision must be regarded as having finally laid at rest any question as to the constitutional validity of the Act on the ground of challenge under Art. 19.<sup>7</sup>

#### 16.11. Public order.

The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or equality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.<sup>8</sup>

The two concepts have well defined contours, it being well established that stray and unorganised crimes of theft and assault are not matters of "public order" since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder.<sup>9</sup> As observed in *Pushkar*

1. (1969) 3 S. C. R. 574 : 1969 S. C. 1153.

2. 1950 S. C. 27 : 1950 S. C. R. 88.

3. *Ibid.*

4. (1970) 3 S. C. R. 530 : 1970 SC 564.

5. (1973) 1 S. C. C. 856.

6. 1974 S. C. 2154.

7. *Khudiram Das v. State of W. B.*, 1975 S. C. 550.

8. *Ashok Kumar v. Delhi Administration*, 1982 S. C. 1143 (1147)

9. *Kuso Shah v. State of Bihar*, 1974 SC 156 (157).

*Mukherjee v. State of West Bengal*,<sup>1</sup> a line of demarcation must be drawn between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. In *Dr. Ram Manohar Lohia v. State of Bihar*,<sup>2</sup> Hidayatullah, J. has expressed this concept picturesquely by saying that one has to imagine three concentric circles: law and order represents the largest circle within which is the next circle: within which is the next circle representing public order and the smallest circle represents the security of State. "Law and Order" comprehends the disorders of less gravity than those affecting "public order" just as "public order" comprehends disorders of less gravity than those affecting "security of State."<sup>3</sup>

Public order has been described by the Supreme Court to be the even tempo of the life of the community taking within its fold even a specified locality and a substantial section of the society as a whole.<sup>4</sup> There is a distinction between the concept of public order and of ordinary law and order or of ordinary violation of law. Public order is an aggravated form of disturbance of public peace. It affects the general current of public life. Similar acts in different situations may give rise to different problems; in one set of circumstances an act may pose only an order problem, whereas in another it may generate deep and widespread vibrations having serious impact on the peace abiding society so as to affect public order. One has to weigh the degree and sweep of the harm the act in question is capable of on its own facts and circumstances.<sup>5</sup>

Peaceful protests and the voicing of a contrary opinion are powerful wholesome weapons in the democratic repercoire. It will therefore be unconstitutional to pick up a peaceful protestant and put him behind the prison bar. The right to repine can be taken away only for a constitutionally recognised purpose, as for example in the interest of public order.<sup>6</sup> In *Ram Bahadur Rai v. State of Bihar*<sup>7</sup> it was alleged (i) that in the meeting of the steering committee, it was decided to form a "sanchalan" samiti for conducting the student's agitation and (ii) that the petitioner had readily agreed to become a member of the samiti. The District Magistrate in his affidavit said that the word agitation itself implied violence and threat to public order. The High Court also held that to "agitate" was to "stir violently". The Supreme Court disagreeing with the High Court said that in regard to social and political questions, the normal meaning of the word was to arouse or attempt to arouse public interest. Chandrachud, J. observed: "It is in our opinion, wrong to treat every agitation as implying violence on a priori considerations. The glorious history of our freedom movement exemplifies that agitations may primarily be intended to be and can be peaceful. But agitations can also be meant to be violent under an apparently lawful cloak and there is ample power to quell these."

What essentially is a problem relating to law and order may due to sudden sporadic and intermittent acts of physical violence on innocent victims in the metropolitan city of Delhi result in serious public disorder. It is the length, magnitude and intensity of the terror wave unleashed by a particular

1. (1969) 2 S. C. R. 635 (642) : 1970 S. C. 852.

2. (1966) 1 S. C. R. 709 (746) : 1966 S. C. 740 (758).

3. *Kuso Shah v. State of Bihar*, 1974 SC 159 (157).

4. *Nagen Murmu v. State of West Bengal*, (1973) 3 S. C. C. 63 (65) : 1973 S.C. 844 (845); *Amiya Kumar v. Commr. of Police*, 1972 SC 2259 (Emergency).

5. *Ibid*; *Ram Manohar Lohia v. State of Bihar*, 1966 S. C. 740; *Abdul Aziz v. D. M.*, 1973 SC 770.

6. *Ram Bahadur Rai v. State of Bihar*, 1975 SC 223.

7. *Ibid*.



act of violence creating disorder that distinguishes it as an act affecting public order from that concerning law and order. Some offences primarily injure specific individuals and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely. The question is of the survival of the society and the problem is the method of control.<sup>1</sup>

#### 16.12. *Limitation on the Power of State.*

The power given to the State under the Preventive of Detention Acts is an extraordinary power. It is exercisable under special conditions and is subject to definite limitations. The nature of the power is such that the liberty of an individual can be deprived on the subjective satisfaction of the prescribed authority that there is sufficient cause for his detention. A detenu has not the benefit of a regular trial or even an objective examination of the accusations made against him.<sup>2</sup> As observed by the Supreme Court in *Dr. Ram Krishna Bhardwaj v. State of Delhi*.<sup>3</sup> Preventive detention is a serious invasion on of personal liberty and such safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.

#### 16.13. *Liberty of individual...Important.*

The liberty of an individual is a matter of great constitutional importance in our system of governance. The detention of a person without a trial, merely on the subjective satisfaction of an authority however, high said Hidayatullah, J. is a serious matter. It must require the closest scrutiny of the material on which the decision is formed, leaving no room for errors or at least avoidable errors. The very reason that the courts do not consider the reasonableness of the opinion formed or the sufficiency of the material on which it is based, indicates the need for the greatest circumspection on the part of those who wield this power over others".<sup>4</sup>

It is the duty of the Court as the custodian and sentinel on the ever vigilant guard of the freedom of an individual to scrutinize with due care and anxiety, that this precious right which he has under the Constitution is not in any way taken away capriciously, arbitrarily or without legal justification.<sup>5</sup>

Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.<sup>6</sup> In *Kishori Mohan Bera v. State of West Bengal*<sup>7</sup> Shelat, J. said : "Preventive Detention Act, confer extraordinary power on the executive to detain a person without recourse to the ordinary laws of the land and to trial by courts. Obviously, such a power places the personal liberty of such a person in extreme peril against which he is provided with a limited right of challenge only. There can therefore be no doubt that such a law has to be strictly construed. Equally also, the power conferred by such a law has to be exercised with extreme care and scrupulously within the bounds laid down in such a law."<sup>8</sup> "In a sense this approach", as Krishna Iyer, J. said, "is only an

1. *Ashok Kumar v. Delhi Administration*, 1982 S. C. 1147 (1148).

2. 1953 S. C. R. 708 : 1953 S. C. 318.

3. 1968 SC 1509 (1512).

4. *Rameshwar Lal v. State of Bihar*, (1968) 2 S. C. R. 505 : 1968 S. C. 1303 (1305).

5. *Daktar Mudi v. State of West Bengal*, 1974 S. C. 2086 (2088).

6. *Ram Krishna Bhardwaj v. State of Delhi*, 1953 S.C.R. 708 : 1953 S. C. 318 (320).

7. *Kishori Mohan Bera v. State of W. B.*, 1972 S. C. 1749.

8. *Kishori Mohan Bera v. State of West Bengal*, 1972 S. C. 1749 (1751); *Bhut Nath v. State of West Bengal*, 1974 S. C. 806 (808).

application of the insistence of fairness when power is exercised to affect others' rights, particularly the most sensitive of all rights' personal freedom".<sup>1</sup>

The Legislative power of the Parliament and the State Legislature to make laws for preventive detention within their allotted fields is plenary, subject only to constitutional limitations which are mentioned in Clauses 4 to 7 of Art. 22.

Three things are expressly considered. In Art. 22 (5) it is first considered that the man if detained has a right to be given as soon as may be the grounds on which the order has been made. He may otherwise remain in custody without having the least idea as to why his liberty has been taken away. This is considered an elementary right in a free democratic State. Having received the grounds for the order of detention, the next point which is considered is, "but that is not enough ; what is the good of the man merely knowing grounds for his detention if he cannot take steps to redress a wrong which he thinks has been committed either in belief the grounds or in making the order." The clause, therefore, further provides that the detained person should have the earliest opportunity of making a representation against the order. The representation has to be against the order of detention because the grounds are only steps for the satisfaction of the Government and on which satisfaction the order of detention has been made. The third thing provided is in cl. (6). It appears to have been thought that in conveying the information to the detained person there may be facts which cannot be disclosed in the public interest. The authorities are, therefore, left with a discretion in that connection under cl. (6). The grounds which form the basis of satisfaction when formulated are bound to contain certain facts, but mostly they are themselves deductions of facts from facts. That is the general structure of Art. 22, cls. (5) and (6) of the Constitution.<sup>2</sup>

#### 16.14. Preventive Detention in Emergency.

The liberty of the citizen is a priceless freedom sedulously secured by the Constitution. Even so during times of emergency in compliance with the provisions of the Constitution the said freedom may be curtailed but only in strict compliance with statutory formalities which are the vigilant concern of the courts to enforce.<sup>3</sup>

It may appear shocking that a person may be detained without a trial or without being even informed of the specific grounds on which such action is deemed necessary, in the larger interests of the security of the State such as maintenance of peaceful conditions in the country, public order conduct of military operations, etc., the Parliament has thought it necessary when a grave emergency arose to invest the appropriate Government and the Administrator with that power. Validity of the statute which invests the executive with these drastic powers has been upheld by the Supreme Court, and that is no longer a live issue. The satisfaction of the authority which justified the use of the power under Rule 30, and confirmation of the order of detention are not subject to judicial review for the order of detention without trial is pre-eminently an executive act. The subjective satisfaction of the detaining authority is a condition of the making of the order, and if that condition is shown to exist, the Courts have no power to enquire into the sufficiency of materials on which the order is made or the propriety or expediency of making the order. It is the satisfaction of the prescribed authority which is determinative of the validity. That, however, does not exclude the Court's power to investigate into the compliance

1. *State of Bombay v. Atma Ram Shridhar Vaidya*, 1951 SC 157 (161).

2. *Bhut Nath v. State of West Bengal*, 1974 S. C. 806 (810).

3. *Sher Mohammad v. State of West Bengal*, 1975 S. C. 2049 (2050).

with the procedural safeguards imposed by the statute, or into the existence of prescribed conditions precedent to the exercise of power, or into a plea that with the procedural safeguards imposed by the statute, or into the existence of the order was made *mala fide* or for a collateral purpose. That, however, is not judicial review of the order.<sup>1</sup>

A writ of *certiorari* lies whenever a body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority : it does not lie to remove or adjudicate upon the order which is of an administrative or ministerial nature.<sup>2</sup>

Those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. It follows that any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. It is a matter of grave concern that in an urbanised areas like cities and towns and particularly in the metropolitan city of Delhi the law and order situation is worsening every day and the use of knives and firearms has given rise to a new violence. There is a constant struggle to control the criminal activities of the persons engaged in such organised crimes for the maintenance of public order. There is no reason why the Executive cannot take recourse to its power of preventive detention in those cases where the court is genuinely satisfied that no prosecution could possibly succeed against the detenu because he is a dangerous person who has overawed witnesses or against whom no one is prepared to depose.<sup>3</sup>

#### 16.15. Detention under Preventive Detention Act.

When the liberty of the citizen is put within the reach of authority and the scrutiny from courts is barred, the action must comply not only with the substantive requirements of the law, but also with those forms which alone can indicate that the substance has been complied with. If a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. Therefore, it would be legitimate to require in such cases strict observance of the rules. If there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu.<sup>4</sup>

A person can be detained if the appropriate government is satisfied that in order to prevent him from doing the prejudicial acts mentioned in the Rules it is necessary to detain him in prison subject to the conditions imposed in the manner prescribed in the Rules. To put it in the negative form no restrictions other than those prescribed under the Rules can be imposed on the detenu. If the appropriate authority seeks to impose on a detenu a restriction not so prescribed the said authority will be interfering with the personal liberty of

1. *Sadhu Singh v. Delhi Administration*, 1966 S. C. 91 (94).
2. *Province of Bombay v. Khushaldas S. Advani*, 1950 S. C. R. 621 : 1950 S. C. 222.
3. *Ashok Kumar v. Delhi Administration*, 1982 S.C. (1143) 1147 (para 14).
4. *Ram Manohar v. State of Bihar*, 1966 S. C. 740.

the detenu in derogation of the law whereunder he is detained. The conditions regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him but are conditions subject to which his liberty can be restricted. As in the *Bombay Conditions of Detention Order, 1951* prohibiting a detenu from writing a book or sending it for publication the Supreme Court held that the State of Maharashtra infringed the personal liberty of the detenu in derogation of the law whereunder he was detained.<sup>1</sup>

#### 16.16. Preventive detention and subjective satisfaction.

Preventive detention is largely precautionary and based on suspicion. The court is the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based. This being the nature of proceedings, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material would be likely to act in a prejudicial manner and if so whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and could not be intended to be judged by objective standards. They are essentially matters which have to be administratively considered for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to be subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them.

It may be taken as settled that the satisfaction of the detaining authority cannot be subjected to objective tests; that the Courts are not to exercise appellate powers over such authorities and that an order proper on its face, passed by a competent authority in good faith is a complete answer. The rulings in our country have adopted this approach as do the English Courts. In England one reason given for the adoption of this approach was that the power was entrusted to the Home Secretary and to the Home Secretary alone. In India Courts are ordinarily satisfied on the production of a proper order of detention made in good faith by an authority duly authorised and have not enquired further even though the power is exercised by thousands of officers subordinate to the Central and State Governments as their delegates. When from the order itself circumstances appear which raise a doubt whether the officer concerned had not misconceived his own powers, there is need to pause and enquire. This is more so when the exercise of power is at the lowest level permissible under the Defence of India Act. The enquiry then is not with a view to investigate the sufficiency of the materials but into the officers' notions of his power, for it cannot be conceived for a moment that even if the Court did not concern itself about the sufficiency or otherwise of the materials on which action is taken, it would, on proof from the order itself that the officer did not realise the extent of his own powers, not question the action. The order of detention is the authority for detention. That is all which the detenu or the Court can see.<sup>2</sup>

The satisfaction of the Government which justifies the order under the rule is a subjective satisfaction. A court cannot enquire whether grounds

1. *Maharashtra State v. Prabhakar*, 1966 S. C. 424 (428).

2. *Ram Manohar v. State of Bihar*, 1966 S. C. 740 (755),

existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. When an order is on the face of it not in terms of the rule, a Court cannot equally enter into an investigation whether the order of detention was in fact, that is to say, irrespective of what is stated in it, in terms of the rule. In other words, in such a case the State cannot be heard to say or prove that the order was in fact made, for example, to prevent acts prejudicial to public order which would bring it within the rule though the order does not say so. To allow that to be done would be to uphold a detention without a proper order. The statements in the affidavit used by the respondent State were it was held of no avail for establishing that the order of detention was in terms of the rule. The detention was not under the affidavit but under the order.<sup>1</sup>

The detaining authority should be bonafide satisfied about the prejudicial activities of the detenu. Absence of bonafides in this context does not mean proof of malice, for an order can be malafide although the officer is innocent. The important point is that the satisfaction of the public functionary, though subjective, must be real and rational, not colourable, fanciful, mechanical or unrelated to the objects enumerated in the Preventive Detention Act.<sup>2</sup> As Viscount Haldane LC said : "Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although so far as the state of mind is concerned, he acts ignorantly, and in that sense innocently."<sup>3</sup>

The Court can not test the subjective satisfaction of the authority as to the propensity of the petitioner to act in a manner prejudicial to supplies and services essential to the community by objective standards.<sup>4</sup>

#### 16.17. Two imperatives.

It is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in clauses (4) and (5) of Art. 22 and if any order of detention is made in violation of such safeguards, it would be liable to be struck down as invalid. It is immaterial whether these constitutional safeguards are incorporated in the law authorising preventive detention because even if they are not they would be deemed to be part of the law as a super-imposition of the Constitution which is the supreme law of the land and they must be obeyed on pain of invalidation of the order of detention.<sup>5</sup>

The Supreme Court explained the true meaning and import of clause (5) in *Khudiram Das v. The State of West Bengal*.<sup>6</sup> "The constitutional imperatives enacted in this article are two-fold; (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These

1. *Ram Manohar v. State of Bihar*, 1965 SC 740 (746).

2. *Bhutnath v. State of West Bengal*, 1974 S. C. 806 (811) : (1974) 1 S. C. C. 645 (653).

3. *Shearer v. Shields*, 1914 A. C. 808.

4. *Imam Shaik v. State of West Bengal*, 1974 S. C. 2131 (2133).

5. *Vimal Chand v. Pradhan*, 1979 SC 1501 (1520) para 3.

6. 1975 S. C. 550 (554).

are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security."

There are thus two distinct safeguards provided to a detenu ; one is that his case must be referred to an Advisory Board for its opinion if it is sought to detain him for a longer period than three months and the other is that he should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention. Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that the representation of the detenu was sent by it to the Advisory Board and the Advisory Board has considered the representation and then made a report expressing itself in favour of detention. Even if the Advisory Board has made a report stating that in its opinion there is sufficient cause for the detention, the State Government is not bound by such opinion and it may still on considering the representation of the detenu or otherwise, decline to confirm the order of detention and release the detenu. The detaining authority is, therefore, bound to consider the representation of the detenu on its own and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenu.<sup>1</sup>

Article 22 (5) of the Constitution enacts : "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicated to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order". In *Abdul Karim v. State of West Bengal*<sup>2</sup> the Supreme Court interpreted the language of Art. 22 (5) and observed :

"Article 22 (5) does not expressly say to whom the representation is to be made and how the detaining authority is to deal with the representation. But it is necessarily implicit in the language of Art. 22 (5) that the State Government to whom the representation is made should properly consider the representation as expeditiously as possible. The constitution of an Advisory Board under Section 8 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it." The constitutional right to make a representation guaranteed by Art. 22 (5) must be taken to include by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Art. 22 (5) is a valuable constitutional right and is not a mere formality. It is, not possible to accept the argument that the State Government is not under a legal obligation to consider representation of the detenu or that the representation must be kept in cold storage in the archives of the Secretariat till the time or occasion for sending it to the Advisory Board is reached. If this view point contended for by the respondent was correct, the constitutional right under Art. 22 (5) would be rendered illusory".

Thus the two obligations of the Government to refer the case of the detenu to the Advisory Board and to obtain its report on the one hand and to

1. *Vimal Chand v. Pradhan*, 1979 S. C. 1501 (1503).
2. (1969) 3 S. C. R. 479 : 1969 S. C. 1028.

give an earliest opportunity to him to make a representation and consider the representation on the other, are two distinct obligations independent of each other.

In *Pankaj Kumar Chakraborty v. State of West Bengal*<sup>1</sup> the Supreme Court again considered Clause (5) of Art. 22 and enunciated the following principle :

“It is clear from cls (4)<sup>1</sup> and (5)<sup>2</sup> of Art. 22 that there is a dual obligation on the appropriate Govt. and a dual right in favour of the detenu, namely, (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case considered by the Board before it gives its opinion. If in the right of that representation the Board finds that there is no sufficient cause for detention the Government has to revoke the order of detention and set at liberty the detenu. Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention”.

It is, therefore, well settled that in case of preventive detention of a citizen, the Constitution by Art. 22 (5) as interpreted by the Supreme Court enjoins that the obligation of the appropriate Government to afford the detenu the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation, amongst other materials to the Board to enable it to form its opinion and to obtain such opinion.<sup>2</sup>

The nature of the dual obligation of the Government and the corresponding dual right in favour of the detenu under Art. 22 (5) was reiterated by the Supreme Court in *Khairul Haque v. The State of West Bengal*, W. P. No. 246 of 1969, [decided on Sept. 10, 1969] in these words :

“It is implicit on the language of Art. 22 that the appropriate Government, while discharging its duty to consider the representation, cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. There was, therefore, no reason for the Government to wait for considering the petitioner's representation until it had received the report of the Advisory Board. As laid down in *Sk. Abdul Karim v. State of West Bengal*<sup>3</sup> the obligation of the appropriate Government under Art. 22 (5) is to consider the representation made by the detenu as expeditiously as possible. The consideration by the Government of such representation has to be, as aforesaid, independent of any opinion which may be expressed by the Advisory Board. The fact that Art. 22 (5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must, when made, be considered and disposed of as expeditiously as possible, otherwise it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning”<sup>4</sup>

1. (1970) 1 S. C. R. 543 : 1970 S. C. 97 (101) ; *Narendra Purshottam v. Gujral*, (1979) 2 S. C. R. 315 : 1979 S. C. 420 (422).

2. *Narendra Purshottam v. Gujral*, 197 S<sup>2</sup>. C. 420 (423).

3. 1969 S. C. 1028.

4. 1979 SC 422 (423).

The same procedural safeguards were reaffirmed by the Supreme Court in *Jaynarayan Sukul v. State of West Bengal*,<sup>1</sup> and *Dhurus Kanu v. State of West Bengal*.<sup>2</sup>

The High Court in the case of *Narendra v. Gujra*<sup>3</sup> and the Delhi High Court in *Thaneswar Singh v. Union of India*, Cr. W. No. 6 of 1978 decided on September 25, 1978, appear to be labouring under misconception that merely because there was no express provision in S. 8 (b) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act placing an obligation to forward the representation made by the detenu along with the reference to the Advisory Board, unlike those contained in Section 9 of the Preventive Detention Act, 1950 and Section 10 of the Maintenance of Internal Security Act, 1971 there was no obligation cast on the Government to consider the representation made by the detenu before forwarding it to the Advisory Board. The Supreme Court however, said: 'We have no doubt in our mind that when liberty of the subject is involved, whether he is under the Preventive Detention Act or the Maintenance of Internal Security Act or the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject was not deprived of his personal liberty otherwise than in accordance with law.'<sup>4</sup> When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making representation against the order. These procedural safeguards are ingrained in our system by judicial interpretation. The power of preventive detention by the Government under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, is necessarily subject to the limitations enjoined on the exercise of such power by Art. 22 (5) of the Constitution as construed by the Supreme Court.<sup>5</sup>

The constitution is all pervasive. All laws made by a State must, therefore, yield to constitutional limitations and restrictions. The citizen's right to personal liberty is guaranteed by Art 22 irrespective of his political beliefs, class, creed or religion. The Supreme Court has forged certain procedural safeguards in the case of preventive detention of citizens. These safeguards might be designated as a regulative 'Postulate of Respect', that is, respect for the intrinsic dignity of the human person.<sup>6</sup>

To put it less emphemistically, the alternative is the enunciation of judicial review itself, and acceptance of the intolerable principle that the Government is the judge of its own powers.<sup>7</sup> So the Supreme Court observed in *Prabhu Dayal Deorah v. District Magistrate, Kamrup*.<sup>8</sup>

1. (1970) 3 SCR 225 : 1970 S.C. 62.

2. 1975 S.C. 571.

3. 1979 SC 420.

4. *Narendra Purshottam v. Gujral*, 1979 S. C. 420 (423) ; *Rahmatullah v. State of Bihar*, 1981 S. C. 2069 (2070) quoted in 1979 S. C. 423.

5. *Ibid* , p 423.

6. 1979 SC 420 (424).

7. *Narendra Purshottam v. Gujral*, 1979 S. C. 420 (424).

8. (1974) 2 S.C.R. 12 : 1974 S. C. 183 (199).



"We say and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And the observance has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution the only guarantee of personal liberty is that he shall not be deprived of it except in accordance with the procedure established by law. The need today for maintenance of supplies and services essential to the community cannot be over emphasized. There will be no social security without maintenance of adequate supplies and services essential to the community. But social security is not the only goal of a good society. There are other values in a society. Our country is taking singular pride in the democratic ideals enshrined in its Constitution and the most cherished of these ideals is personal liberty. It would indeed be ironic if, in the name of social security, we would sanction the subversion of this liberty."

The constitutional safeguards embodied in Art. 22 (5) of the Constitution as construed by the Supreme Court, must, therefore, be read into the provisions of Section 9 (b) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 to prevent any arbitrary executive action.<sup>1</sup>

Subjective satisfaction of the detaining authority is not wholly immune from judicial reviewability. The subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the court can always examine whether the requisite satisfaction was arrived at by the authority: if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad.<sup>2</sup>

#### 16.18. *Power of detention not quasi-judicial.*

The observation of the Supreme Court in *Bhuthnath Mate v. The State of W. B.*<sup>3</sup> that the exercise of the power of detention implies a "quasi judicial" approach *i. e.*, that the power must be regarded as a *quasi-judicial* power. The only thing intended to emphasise is that the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention. The power of detention is not a *quasi judicial power*.<sup>4</sup> This does not however mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability.<sup>5</sup>

The subjective satisfaction of the detaining authority constitutes the foundation for the exercise of the power of detention and the court can not be inviated to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The courts can not, on a review of the grounds, substitute its own opinion for that of the authority, for what is made a condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose, but the subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of deten-

1. *Narendra Purshottam v. Gujral*, 1979 S. C. 420 (425).

2. *Khudiram Das v. State of West Bengal*, 1975 S. C. 550 (557).

3. 1974 S. C. 806.

4. *Khudiram Das v. State of West Bengal*, 1975 S. C. 550 (557).

tion for a specified purpose, the condition of exercise of the power of detention would be fulfilled.<sup>1</sup>

### 16.19. Affidavits on behalf of State.

The source of information should be clearly disclosed.<sup>2</sup>

In *Barium Chemicals Ltd. v. Company Law Board*<sup>3</sup> the Supreme Court deprecated "slipshod verification" in an affidavit and insisted that verification should invariably be modelled on the lines of Order 19 Rule 3 of the Code of Civil Procedure whether the Code in terms applied or not. The importance of the verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations.<sup>4</sup>

In a habeas corpus petition where a *Rule Nisi* has been issued, it is incumbent upon the state to satisfy the court that the detention of the petitioner was legal and conformity not only with the mandatory provisions of the Maintenance of Internal Security Act, 1971 but that it was also in accord with the requirements implicit in clause (5) of Art. 22 of the Constitution.<sup>5</sup>

Since the Court is precluded from testing the subjective satisfaction of the detaining authority by objective standards it is desirable that in response to the *Rule Nisi* the counter affidavit on behalf of the State should be sworn to by the District Magistrate or the authority on whose subjective satisfaction the detention order was passed. If for sufficient reason shown to the satisfaction of the Court the affidavit of the person who passed the order of detention can not be furnished, the counter affidavit should be sworn by some responsible officer who personally dealt with or processed the case in the Government secretariat or submitted it to the Minister or other officer duly authorised under the Rules of Business framed by the Governor under Article 166 of the Constitution to pass orders on behalf of the Government in such matters.<sup>6</sup> The fact of subjective satisfaction, solemnly reached, considering relevant and excluding irrelevant facts, sufficient in degree of danger and certainly to warrant pre-emptive casting into prison is best made out by the detaining District Magistrate not one who professionally reads records and makes out a precise in the form of an affidavit. The purpose is missed by the seriousness of the matter, the proof is deficient, going by the ordinary rules of evidence, and the court is denied the benefit of the word of one who takes responsibility for the action. If action has to be taken against the detainer for misuse. "We are aware" said K Iyer, J. that in the exigencies of administration, an officer may be held up for away, engrossed in other important work, thus being unavailable to swear an affidavit. The next best would then be the oath of one in the secretariat who officially is conversant of or has participated in the process of approval by Government not one, who long later, reads old files and gives its gist to the Court.<sup>7</sup> Mechanical means are easy but not legitimate. We emphasise this infirmity because routine summaries of files, marked as affidavits, appear in the returns to *rule nisi* showing scant courtesy to the constitutional gravity of deprivation of civil liberty".<sup>8</sup>

1. *Khudiram Das v. State of W.B.*, 1975 S. C. 550 (556).

2. *State of Bombay v. Pushottan Jog Nalk*, 1952 S. C. R. 674 : 1952 S. C. 317.

3. (1966) Supp. S. C. R. 311 : 1967 S. C. 295

4. *Nambiar v. Union of India*, (1970) 3 S. C. R. 121 : 1970 S. C. 652 (653).

5. *Narayan Singh v. State of M. P.*, 1972 S. C. 2215 quoted in 1974 S. C. 679 (682).

6. *Shaik Hanif v. State of West Bengal*, 1974 S. C. 679 (682).

7. 1974 S. C. 806 (814) para 21.

8. *Bhutnath v. State of West Bengal*, 1974 S. C. 806 (814); *Jagdish Prasad v. State of Bihar*, 1974 S. C. 911 (914).

In *Jagdish Prasad v. State of West Bengal*<sup>1</sup> some Upper Division Assistant (Special Home Deptt.) had sworn an affidavit, not with personal knowledge but with "paper wisdom. The Supreme Court again observed : "Mechanical affidavits mineaturising the files into a few paragraphs, by some one handy in the secretariat 'can not be regarded as satisfactory. This is not a mere punctuals of procedure but a probative requirement of substance."

The failure to furnish the counter affidavit of the Magistrate who passed the order of detention, is an impropriety. In most cases, it may not be much of consequence but in a few cases where malafides or extraneous considerations are attributed to the Magistrate or the detaining authority, it may, taken in conjunction with other circumstances, assume the shape of serious infirmity, leading the Court to declare the detention illegal.<sup>2</sup> These observation will equally hold good in a case where the detention order is exposed to the risk of attack on the ground of being a colourable exercise of jurisdiction.

In *Habibullah v. State of W. B.*<sup>3</sup> the fact that the District Magistrate was apparently occupied with problems of law and order as also with the problems of procurement of rice in the particular district was accepted as a satisfactory explanation for the District Magistrate not himself filing the affidavit.

In *Ranjit Dam v. State of W. B.*<sup>4</sup> the reason given for not making the counter affidavit by the District Magistrate himself who had passed the detention order was that he had since then been appointed as Secretary of the State Electricity Board. The reason was considered to be unsatisfactory but as nothing turned on that fact the court left it at that. In *Shaik Hanif v. State W. B.*<sup>5</sup> also the court considered the explanation far from being satisfactory but the mere omission to file the affidavit of the District Magistrate was held not to affect the detention order.

The order of detention may be declared invalid if it could be proved to have been made by the authority concerned in malafide exercise of power, the burden of proving the absence of good faith is upon the detenu.<sup>6</sup> The question of bad faith would have to be decided with reference to the circumstances of each case but the observation made in one case can not be regarded as a precedent in dealing with other cases.<sup>7</sup>

It is obligatory on the part of the State to place before the Court all the relevant facts relating to the impugned detention truly, clearly and with the utmost fairness. Full disclosure must be made without any reservation. It is incumbent on the officer concerned swearing the counter affidavit to take good care to satisfy himself that what he states on oath is absolutely true according to the record.<sup>8</sup>

1974 S. C. 911.

*Shaik Hanif v. State of West Bengal*, 1974 S C 679 (682), para 9 quoted in 1974 S C 914.

3. 1974 S C 493 (495); *Vakil Singh v. State of J & K*, 1974 S C 2337; *Mohamad Alam v. State of West Bengal*, 1974 S C 917 (911).

4. 1972 S C 1753.

5. 1974 S C 679.

6. *Ashutosh v State of Delhi*, 1953 S C 451 (452)

7. *Naranjan Singh v State of Punjab*, 1952 S C 106 (108)

8. *Mohd Subrati v State of West Bengal*, (1973) 3 S C C 250 (256)

When the District Magistrate has made statement on oath, the burden would be heavy on the petitioner to show that what was stated by the District Magistrate was not correct. The petitioner would have to establish from the materials on record that the District Magistrate could not passibly have arrived at the satisfaction which he claimed to have done and that his satisfaction was colourable.<sup>1</sup>

The Courts will not lightly accept the submission of the State that the District Magistrate had made an incorrect statement in his affidavit. The position might be different if the District Magistrate himself had made a subsequent affidavit stating on oath that he had made a mistake in the earlier affidavit in reply and explained the circumstances under which he came to make such mistake. The Court would then have examined the explanation given by the District Magistrate and if satisfied as regards the genuineness of the mistake, the court would accept the subsequent statement of the District Magistrate and ignore the earlier statement.<sup>2</sup>

### 16.20. Sources of information.

It is not necessary under the law to disclose the sources of the information or the exact words of the information so long as the activities which formed the foundation of the impugned order were actually disclosed to the detenu.

It is true that the satisfaction of the detaining authority to which Section 3 (1) (a) refers is his subjective satisfaction, and so is not justiciable. Therefore it would not be open to the detenu to ask the Court to consider the question as to whether the said satisfaction of the detaining authority can be justified by the application of objective tests. It would not be open, for instance, to the detenu to contend that the grounds supplied to him do not necessarily or reasonably lead to the conclusion that if he is not detained, he would indulge in prejudicial activities. The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of law; the adequacy of the material on which the said satisfaction purports to rest also cannot be examined in a Court of law.<sup>3</sup> The Court are not to exercise appellate powers over such authorities

By its very nature, preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. The authority making the order, therefore, cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act.<sup>4</sup>

The satisfaction of the government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State

1. *Mawla Shaw v State of West Bengal*, 1974 S C 957 (959)

2. *Dulal Chandra Majumdar v State of West Bengal*, 1974 S C 2361 (2362)

3. *Rameshwar v District Magistrate*, AIR 1964 S C 334 (337); *State of Bombay v Atma Ram*, 1951 S C R 167 (176); 1951 S C 157 (160)

4. 1951 SC 157 (161).

Government were satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of *mala fides* cannot be challenged in a Court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the Court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a Court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a Court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government.<sup>1</sup>

### 16.21. Grounds.

The question of satisfaction, except on ground of *mala fide* cannot be challenged in a court.<sup>2</sup>

The expression "Grounds" means all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which the order of detention is based. The word "grounds" does not merely mean a recital or reproduction of grounds to satisfaction of the authority in the language of the provisions of the Act, nor is its connotation restricted to a bare statement of a conclusion of facts. It means something more. That something is to factual constituent of the "grounds" on which the subjective satisfaction of the authority is based. The basic facts and material particulars, therefore, which are the foundation of the order of detention will also be covered by "grounds", within the contemplation of Art. 22 (5) and are required to be communicated to the detenu unless there disclosure is considered by the authority to be against public interest.<sup>3</sup>

"Grounds" do not mean mere factual material which led to such factual inferences. The "Grounds" must be self sufficient and self explanatory.<sup>4</sup> In *Vakil Singh v. State of J K*,<sup>5</sup> the Supreme Court pointed out that apart from conclusions of fact grounds had a factual constituent also. Grounds meant materials on which the order of detention was primarily based that is to say, all primary facts though not subsidiary facts or evidential details.<sup>6</sup>

What should be stated in the grounds? It is true that whatever may be stated or omitted to be stated, the ground cannot be vague; that the Constitution envisages the furnishing of the grounds once and, therefore, there is no

1. *State of Bombay v. Atma Ram*, 1951 S C 157 (160).

2. *Ibid.*

3. *Khudiram Das v. State of West Bengal*, 1975 S C 550 (554); para 6; *Golam alias Golam Mallick v. State of West Bengal*, 1976 S C 754; *Ram Krishna Bhardwaj v. State of Delhi*, 1953 S C R 708; 1953 S C 318; *Shamrao Vishnu v. District Magistrate*, 1956 S C R 644; 1957 S C 23; *Habibullah v. State of West Bengal*, 1974 S C 493; *Bhutnath v. State of West Bengal*, 1974 S C 806 (810).

4. *Shallini Soni v. Union of India*, 1981 S C 431 (434).

5. 1974 S C 2337.

6. *Ganga Ram Chand v. Under Secretary*, 1980 S C 1744.

occasion for furnishing particulars or supplemental grounds at a later stages ; and Art. 22 (5) does not give the detained person a right to ask for particulars, nor does it give the authorities any right to supplement the grounds, once they have furnished the same. The first part of Art. 22, cl. (5) gives a right to detained person to be furnished with "the grounds on which the order has been made" and that has to be done "as soon as may be." The second right given to such person is of being afforded "the earliest opportunity of making a representation against the order." It is obvious that the grounds for making the order as mentioned above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of the three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the "grounds" and they must be supplied. No part of such "grounds" can be held back nor can any more grounds be added thereto. What must be supplied are the "grounds on which the order has been made" and nothing less.<sup>1</sup>

In *State of Bombay v. Atma Ram Shridhar Vaidya's*<sup>2</sup> case, the Bombay High Court had allowed a Habeas Corpus petition because the grounds did not give the time, place and nature of the activities indulged in by the petitioner so that his right to make a representation was defeated, although, the particulars, which were subsequently supplied to the detenu by the Commissioner of Police were enough to enable him to make an effective representation. A Bench of five Judges of this Supreme Court held that there had been no contravention of the Constitutional right to make a representation. It was explained there that grounds which had to be communicated to the detenu were conclusions from facts, constituting particulars, all of which not be conveyed to the detenu simultaneously. The particulars supplied subsequently were enough to remove the uncertainty from the grounds. If what may appear vague can be made definite by supplying particulars afterwards, it follows that, a fortiori, vagueness in the earlier or any other part of a document may be removed by the particulars contained in the remaining parts of the very document containing grounds.

It was also held by the Supreme Court in *Lawrence Joachim Joseph D' Souza v. State of Bombay*<sup>3</sup> that the detenu has a right to call for particulars. This implies that mere alleged vagueness of grounds or insufficiency of particulars, without calling upon the detaining authority to remedy this defect, may not be enough to vitiate a detention order.

#### 16.22. Some irrelevant and non existent grounds.

The subjective satisfaction of the detaining authority must be properly based on all the reasons on which it purports to be based. If some one of those reasons are found to be non existent or irrelevant the court can not predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons. To uphold the order on the remaining reasons would be to substitute the objective standards of the court for the subjective satisfaction of the detaining authority.

1. 1951 S C R 167: 1951 S C 157 (161).

2. 1951 SCR 167: 1951 SC 157.

3. 1956 S C R 382 : 1956 S C 531.

4. *Keshav Talpade v. King Emperor*, 1943 F. CR 88.

"If a detaining authority gave four reasons for<sup>2</sup>detaining a man, without distinguishing between them, and any two or three of the reasons were held to be bad, it could never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.<sup>1</sup> In *Shibban Lal Saksena v. The State of U.P.*<sup>2</sup> the grounds of detention communicated to the detenu were of two fold character, i.e., fell under two different categories, viz. (1) prejudicial to maintenance of supplies essential to community, and (2) injurious to maintenance of public order. The first of the above grounds was not made out as a fact but the order was upheld by the Advisory Board on the second ground. The question before the Supreme Court was whether the order of detention, when one of the two grounds was found to be non-existent by the Advisory Board could be maintained. Mukherji, J. speaking for the Court stated : "The answer, in our opinion, can only be in the negative. The detaining authority gave here two grounds for detaining the petitioner. We can neither decide whether these grounds are good or bad nor can we attempt to assess in what manner and to what extent each of these grounds operated on the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which the detention order was made. To say that the other ground, which still remains, is quite sufficient to sustain the order, would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute. In such cases, we think, the position would be the same as if one of these two grounds was irrelevant for the<sup>4</sup> purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole."<sup>3</sup>

In *Bhupal Chandra v. Arif Ali*<sup>4</sup> the petitioner was detained with a view to prevent him from acting in any manner prejudicial to the maintenance of Public Order. Five out of 16 grounds did not have any rational relation with public order. In other words one third of the grounds were irrelevant. Quashing the detention order Dwivedi, J. said "we can not assess how far there five grounds have swayed the mind of the District Magistrate and tilted his judgment against the detenu. To the intertwining of relevant and irrelevant grounds of detention the rule of severality would not apply and the whole order of detention will fall down."

If equivocal language is used and the detenu is not told whether his alleged activities set out in the grounds of detention fall under one head or the other or both, it would be difficult for him to make an adequate representation against the order of detention.<sup>5</sup> In view of the decisions of the Supreme Court in *Kishori Mohan v. State of West Bengal*<sup>6</sup> and *Akshoy Konai v. State of West Bengal*<sup>7</sup> there can be no doubt that if the order of detention purports to be based on the satisfaction of the detaining authority that it is necessary to detain the detenu with a view to preventing him from acting in a manner prejudicial to the maintenance of the public order or security of the state, it would clearly be an invalid order. The satisfaction of the detaining authority such a case would be on the disjunctive and not conjunctive grounds that would

1. *Keshav Talpade v. King Emperor* 1943 FC 88.

2. 1954 SCR 418 : 1954 SC 179 quoted in 1957 SC 167, para 3.

3. *Shibban Lal Saksena v. the State of U. P.* 1954 SCR 418 : 1954 SC 179 (181) para 8.

4. 1974 SC 255 (256) para 4.

5. *Binod Bihari v. State of Bihar*, 1972 SC 2128 (2129), para 2.

6. 1972 SC 1749.

7. 1973 SC 300.

mean that the detaining authority was not certain whether it had reached its subjective satisfaction as to the necessity of exercising the power of detention on the ground of danger to public order or danger to the security of the State; where the disjunctive "or" is used instead of conjunctive and it would mean that the detaining authority was either not certain whether the alleged activities of the detenu endangered public order or the security of the state or it did not seriously apply its mind to the question whether such activities fell under one head or the other and merely reproduce mechanically the language of Section 3 (1) (a)(ii) of the Act. When such equivocal language is used and the detenu is not told whether his alleged activities set out in the grounds of detention fell under one head or the other or both, it would be difficult for him to make an adequate representation against the order of detention.<sup>1</sup>

Even if one of the grounds or reasons which led to the subjective satisfaction of the detaining authority is non-existent or misconceived vague or irrelevant the order of detention would be invalid and it would not avail the detaining authority to content that the other grounds or reasons are good and do not suffer from any such infirmity because it can never be predicated to what extent the bad grounds or reasons operated on the mind of the detaining authority or whether the detention order would have been made at all if the bad grounds or reasons alone were before the detaining authority.<sup>2</sup>

Thus two of the grounds on which the order of detention rests bear no rational connection with "public order" in the interests of which the petitioner was ordered to be detained.<sup>3</sup> The Supreme Court in *Pushkar Mukherjee's*<sup>4</sup> case has observed "that it is well established that the constitutional requirement that the grounds must not be vague must be satisfied with regard to each of the grounds communicated to the person detained subject to the claim of privilege under clause (6) of Art. 22 of the Constitution and therefore even if one ground is vague and the other grounds are not vague, the detention is not in accordance with procedure established by law and is therefore illegal. The power to detain a person without safeguard of a court trial is too drastic to permit a lenient construction and therefore courts must be astute to ensure that the detaining authority does not transgress the limitations subject to which alone the power can be exercised."

In *Moti Lal Jain v. State of Bihar*,<sup>5</sup> the Supreme Court observed : "the subjective satisfaction of the detaining authority must be properly based on all the reasons on which it purports to be based. If some out of those reasons are found to be non-existent or irrelevant, the court cannot predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons. To uphold the order on the remaining reasons would be to substitute the objective standards of the court for the subjective satisfaction of the authority."

### 16.23. Several grounds.

In *Dwarka Das Bhatia v. State of Jammu and Kashmir*,<sup>6</sup> the order of detention was based on the ground that the petitioner was engaged in unlawful

1. *Binod Behari Matho v. State of Bihar*, 1974 SC 2125 (2129) : (1975) 2 SCR 215.
2. *Biram Chandel v. State of U. P.*, 1974 1661 (1165).
3. *Kuso Sah v. State of Bihar*, 1974 SC 156 (158).
4. (1969) 2 SCR 635 : 1970 SC 152.
5. (1968) 3 SCR 587 (593) : 1968 SC 1509, quoted in 1974 SC 156 (158).
6. 1957 SC 164 (168).



smuggling activities relating to three essential commodities, cloth, zari and mercury of which first two were found not to be essential articles. Holding that the order of detention was bad the Supreme Court enunciated the principle: "Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid. The Court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders. It is in the light of these principles that the validity of the impugned order has to be judged.<sup>1</sup>

In *Ram Manohar Lohia v. The State of Bihar and another*,<sup>2</sup> the order of detention was that the District Magistrate was satisfied that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order, it was necessary to make an order that he be detained. Under Rule 30 of the Defence of India Rules, no power was conferred upon the District Magistrate to detain a person on the ground that it was necessary so to do in order to prevent that person from acting in a manner prejudicial to the maintenance of law and order. The order no doubt also referred to the apprehension felt by the District Magistrate about Dr. Lohia acting in a manner prejudicial to public safety. But then the question arose before the Supreme Court whether the order of detention was valid when one of the grounds mentioned in the order, namely, the apprehension of acts prejudicial to the public safety was a good ground. The result was that the detention order mentioned two grounds one of which was in terms of the rule while the other was not. But then the question was what was that which weighed with the District Magistrate, the apprehension regarding public safety or an apprehension regarding the maintenance of law and order? Would the District Magistrate have made the order solely on the ground that he felt apprehension regarding the maintenance of public safety because of the activities in which he thought Dr. Lohia might indulge? It could well be that upon the material before him the District Magistrate would have refrained from making an order under Rule 30 solely upon the first ground. Or on the other hand he would have made the order solely upon that ground. His order, however, gave no indication that the District Magistrate would have been prepared to make it only upon the ground relating to public safety. The Supreme Court by majority held that the order was illegal and could not be sustained.

1. *Dwarka Das v. State of Jammu and Kashmir*, 1957 SC 164 (168).

2. 1966 SC 740 (743).

**16.24. Vague grounds.**

The Supreme Court has held that where grounds are furnished to the detenu those grounds must not be vague and must be such as to enable him to make a proper and effective representation against his detention. The Supreme Court has further held that where there are several grounds, even if one ground is vague, then it is difficult to say whether the ground which is vague and in respect of which the detenu could not make an effective representation did not influence the mind of the detaining authority in arriving at his subjective satisfaction that the detenu would in future be likely to act in a manner prejudicial to the maintenance of supplies and services essential to the community. If the detention order is held invalid on this count, it would be equally so in a case where there are other materials on which the detaining authority could have been influenced in arriving at his subjective satisfaction but which he has not mentioned in the grounds of detention, nor communicated them to the detenu. In such circumstances whether the other materials on record had any effect on the mind of the detaining authority cannot be accepted solely on his statement, because to admit that he alone has such a right would be to accept that the mere *ipsi dixit* of the detaining authority would be sufficient and cannot be looked into. There is a possibility that certain materials on record would disclose that the activities of the detenu are of a serious nature having a nexus with the object of the Act, namely the prevention of prejudicial acts affecting the maintenance of supplies and services essential to the community, and having proximity with the time when the subjective satisfaction forming the basis of the detention order had been arrived at. If these elements exist then the Court would be justified in taking the view that these must have influenced the subjective satisfaction of the detaining authority and the omission to indicate those materials to the detenu would prejudice him in making an effective representation. If so, the detention order on that account would be illegal.<sup>1</sup>

The Courts would look with disfavour upon vague grounds of detention, because such grounds fail to convey to the detenu the precise activity on account of which he is being detained. The detenu is thus prevented from making an effective representation which he might possibly have made, if he had been apprised of the objectionable activity which led to his detention.<sup>2</sup>

Since the detenu is not placed before a Magistrate and has only a right of being supplied the grounds of detention with a view to his making a representation to the government and the Advisory Board, the grounds must not be vague or indefinite and must afford a real opportunity to make a representation against the detention.

In *Chaju Ram v. State of J. & K.*,<sup>3</sup> the Supreme Court has observed that "the grounds charged the petitioner with having conspired with some leaders of Democratic Conference and having incited landless people of RSpura Tehsil to forcibly occupy the land comprised in Nandpur Mechanised Farm and to have persuaded them to resist violently any attempt to evict them. No details of the leaders of the Conference or of the persons incited or the dates on which he conspired or incited the squatters or the time when such conference took place, were mentioned. It would be impossible for anybody to make a representation against such grounds. These grounds were held to be vague. Therefore on both the twin grounds namely, that he was deprived of his right to make a representation and also because the grounds in themselves were very

1. *Daktar Mudi v. State of W. B.*, 1974 SC 2086 (2088) para 6.

2. *Sheikh Ibiahim v. State of West Bengal*, 1974 SC 736 (738).

3. 1971 SC 263 (266).

vague, we must hold that there was no compliance with the law as laid down in the Jammu and Kashmir Preventive Detention Act. The result, therefore, is that the detention must be declared to be unlawful and Chaju must be declared to be entitled to his liberty."<sup>1</sup>

#### 16.25. *Past conduct may be considered.*

The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a man that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order. But in order to justify such an inference it is necessary to bear in mind that such past conduct or antecedent history should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person was necessary.<sup>2</sup> No doubt, it is both inexpedient and undesirable to lay down any inflexible test as to how far distant the past conduct or the antecedent history should be for reasonably and rationally justifying the conclusion that the person concerned if not detained may indulge in prejudicial activities.<sup>3</sup> If in a given case the time lag between the prejudicial activity of the detenu and the detention order made because of that activity is ex facie long, the detaining authority should explain the delay in the making of the detention order with a view to show that there was proximity between the prejudicial activity and the detention order. If the detaining authority fails to do so, in spite of opportunity having been afforded to it, a serious infirmity would creep into the detention order.

#### 16.26. *Single Act.*

In *Anil Dey v. State of West Bengal*<sup>4</sup> the charge against detenu was : "That on 1.8 1972 at about 12-30 hrs. you and your associates committed theft in respect of signal materials from SPH type location box No. 513 which is situated in between UP main and UP CCR line at Dum Dum Junction North Yard (near S. S. P.) and 2 Nos. feed and transformer from the junction box near Signal No. 35 on the said place. The value of the stolen property is valued at Rs. 600/." It is apparent from this averment that the District Magistrate had derived his subjective satisfaction from the circumstance that the detenu was a "notorious stealer of railway stores." operating in Dum Dum Railway yard. The Supreme Court took the view that the ground given was neither too distant nor too trifling to strain judicial credulity to breaking point; on the contrary it was proximate and pernicious, if true. It is self-evident that sophisticated signal equipment could not be removed by a layman or a tyro. Indeed, it required a certain measure of technical skill and electrical expertise. On the other hand, such times were likely to be removed only by persons who were part of a complex of agencies collaborating to remove, secrete and sell to a particular set of persons who may need it or put it to other technical use. The other possibility was that the activity was part of plan of sabotage which brought to a grinding halt the movement of trains. This single act could not live in isolation and necessarily connotes a course of previous conduct whereby some specialisation had been acquired, some specialised agencies had been fabricated and some special mischief had been planned to be perpetrated.<sup>5</sup>

1. *Chaju Ram v. State of J. & K.*, 1971 SC 263 (266).

2. *Wasiuddin v. District Magistrate*, 1981 SC 2166 (2175).

3. *Abdul Munna v. State of WB*, 1974 SC 2066 (2067).

4. 1974 SC 832 (833).

5. *Anil Dey v. State of West Bengal*, 1974 SC 832 (835) para 7.

In *Madhab Roy v. State of West Bengal*<sup>1</sup> on the same reasoning the justifiability of the detention order on a single solitary act cutting and removal of copper return feeder were of railway traction was upheld. These decisions were followed in *Israil S. K. v. District Magistrate, West Dinapur*.<sup>2</sup>

The satisfaction which the District Magistrate is required to reach in order to support the order of detention is that it is necessary to detain the petitioner with a view to preventing him from acting in a particular manner and that satisfaction can obviously be founded only on a reasonably anticipated prognosis of future behaviour of the petitioner made on the basis of past incidents.<sup>3</sup>

A single solitary act attributed to a person may form the basis for reaching a satisfaction that he might repeat such acts in future and in order to prevent him from doing so it may be necessary to detain him. The nature of the act and the attendant circumstances may in a given case be such as to reasonably justify an inference that the person concerned, if not detained would be likely to indulge in commission of such acts in future.<sup>4</sup>

In *Debu Mahto v. State of W. B.*<sup>5</sup> the petitioner was detained on the solitary ground that on 11-8-1972 he and his associates were found ramoving bales of gunny bags by breaking open the wagon. The Advisory Board whose recommendation was accepted by the Government was of the opinion that there was sufficient cause for the detention of the petitioner. The Supreme Court quashed the detention order. Bhagwati, J. speaking for the Court said: "we fail to see how one solitary isolated act of the wagon breaking committed by the petitioner could possibly persuade any reasonable person to reach the satisfaction that unless the petitioner was detained he would in all probability indulge in further acts of wagon breaking. No criminal propensities for wagon breaking could reasonably be inferred from a single solitary act of wagon breaking committed by the petitioner". In this case there was nothing in the affidavit of the District Magistrate even remotely suggesting that wagon breaking was a crime which had become very rampant and was seriously obstructing and thwarting smooth and quick flow of supplies and services essential to the community. In this situation even a single act of wagon breaking by an individual may be regarded in a different light and conceivably afford justification for reaching a satisfaction to such individual may be detained in order to prevent him from acting in a prejudicial manner.<sup>6</sup>

#### 16.27. Detenu's right to get copies of documents.

The right of making an effective representation carries with it the right to get copies of documents relied upon in the grounds of detention. Factual contents of the grounds of detention on which the subjective satisfaction of the detaining authority was based have to be disclosed to the detenu to make an effective representation. It is however not necessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of events and which are not relied upon by the detaining authority in making the order of detention.<sup>7</sup>

1. 1975 SC 255.

2. 1975 SC 168.

3. *Malwa Shaw v. State of West Bengal*, 1974 SC 957 (959).

4. *Debu Mahto v. State of West Bengal*, 1974 SC 816 (817).

5. *Ibid.*

6. *Ibid.* p. 817.

7. *Wasiuddin v. District Magistrate*, 1981 SC 2166 (2173); *Ummu Saleema v. Union of India*, 1981 SC 1191; *Ichhu Devi Chorasla v. Union of India*, 1980 SC 1983; *Pritam Nath v.*

**16.28.<sup>1</sup> Delay, in supplying materials.**

If there is undue delay in furnishing the statements and documents referred to in the grounds of detention the right to make effective representation is denied. The detention can not be said to be according to the procedure prescribed by law.<sup>1</sup> The same view was taken in *Tushar Thakker v. Union of India*.<sup>2</sup>

In *Narendra Purshottam v. Gujral*,<sup>3</sup> "it was urged that the Government was under a constitutional obligation to consider the representation before the hearing before the Advisory Board. The Government has to reach its decision uninfluenced by the opinion of the Advisory Board." In *Ram Chandra Kamat v. Union of India*,<sup>4</sup> offer of inspection of documents twelve days after request for copies was considered fatal to the detention and it was observed : "It there is undue delay in furnishing the statements, and documents referred to in the grounds of detention the right to make effective representation is denied. The detention cannot be said to be according to the procedure prescribed by law. When the Act contemplates the furnishing of grounds of detention ordinarily within five days of the order of detention, the intention is clear that the statements and documents which are referred to in the grounds of detention and required by the detenu and are expected to be in possession of the detaining authority should be furnished with reasonable expedition."

**16.29. Detenu's right to get information.**

In order to make an effective representation, the detenu is entitled to obtain information relating to the grounds of detention. When the grounds of detention are served on the detenu, he is entitled to ask for copies of the statements and documents referred to in the grounds of detention to enable him to make an effective representation. When the detenu makes a request for such documents, they should be supplied to him expeditiously. The detaining authority in preparing the grounds would have referred to the statements and documents relied on in the grounds of detention and would be ordinarily available with him—when copies of such documents are asked for by the detenu the detaining authority should be in a position to supply them with reasonable expedition. What is reasonable expedition will depend on the facts of each case.<sup>5</sup>

**16.30. Delay in making detention order.**

In *Lakshman Khatik v. State of W. B.*<sup>6</sup> the Supreme Court held that a delay of seven months in making an order of detention after the incident which led to the making that order was fatal. The Supreme Court again considered this question in *Golam Hussain v. Police Commr.*<sup>7</sup> and Krishna Iyer, J. said ; "It is true that there must be a live link between the grounds of criminal

*Union of India*, 1981 SC 92 ; *Ram Chandra Kamat v. Union of India*, 1980 SC 765 ; *Francis Mullin v. Khambra*, 1980 SC 849 ; *Mangalbhui Motiram v. State of Maharashtra*, 1981 SC 510 ; *Virendra Singh v. State of Maharashtra*, 1981 SC 1909 ; *Salini Soni v. Union of India*, 1981 S C 431.

1. *Ram Chandra Kamat v. Union of India*, 1980 SC 765 (767).
2. 1981 SC 436 (439) ; *Kirti Kumar v. Union of India*, 1981 SC 1621(1625), para 12.
3. 1979 S C 420.
4. (1980) 2 S C C 270 (273) ; 1980 SC 765.
5. *Ram Chandra A. Kamat v. Union of India*, (1980) 2 SCC 270 (273) para 6.
6. 1974 SC 1264.
7. 1974 SC 1336 (1339).

activity alleged by the detaining authority and the purpose of detention namely, inhibition of prejudicial activity of the species specified in the statute. This credible chain is snapped if there is too long and unexplained an interval between the offending acts and the order of detention. No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done some thing evil.”<sup>1</sup>

There must not be such a long gap between the materials on which reliance was placed and the actual order passed as to lead to the inference that the subjective satisfaction of the District Magistrate was unreal and invalid.<sup>2</sup> In *Malwa Shaw v. State of West Bengal*<sup>3</sup> it was held that the period of about five months which elapsed between the dates of alleged incidents and making of the order of detention could not be regarded as so unreasonably long as to warrant the inference that no satisfaction was really arrived at by the District Magistrate or that the satisfaction was colourable, or no satisfaction at all.

### 16.31. No delay in Governments deciding representation.

The consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. There should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. The appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If, however, the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu.<sup>4</sup>

It is an obligation of the state or the detaining authority to place all the relevant facts before the court and if there is any delay in assisting the detenu pursuant to the order of detention which is *prima facie* unreasonable, the state must give reasons explaining the delay.<sup>5</sup> In *Nizamuddin v. State of W.B.*<sup>6</sup> there was a time lag of about two and half months between the date of the order of detention and the date when the petitioner was actually detained. As no explanation was given by the District Magistrate in his affidavit in reply. The Supreme Court was not satisfied that the District Magistrate had applied his mind and arrived at a real and genuine subjective satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner. The Supreme Court did not however mean that whenever there was delay in assisting the detenu pursuant to the order of

1. *Golam Hussain v. Police Commr.*, 1974 SC 1336 (1339) ; *Sk. Abdul Munnaf v. State of West Bengal*, 1974 SC 2066 (2078).

2. *Gdud Ali v. State of West Bengal*, 1974 SC 894 (895).

3. 1974 SC 957 (959).

4. *Jayanarayan Sukla v. State of West Bengal*, 1970 SC 675 quoted in (1980) 2 SCC 278.

5. *Sarajul v. State of West Bengal*, W. P. 2000 of 1973 decided by SC on 9.9.1974.

6. W. P. no 319 of 1974 decided by SC on 5.11.74.

detention, the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances. The detaining authority may have a reasonable explanation for the delay and that might be sufficient to disprict the inference that its satisfaction was not genuine.

The question whether the representation submitted by the detenu was dealt with all reasonable promptness and diligence is to be decided not by the application of any rigid or inflexible rule or set formula nor by a mere arithmetical counting of dates, but by a careful scrutiny of the facts and circumstances of each case if on such examination, it is found that there was any remissness, in difference or avoidable delay on the part of the detaining authority. State Government in dealing with the representation, the Court will undoubtedly treat it as a factor vitiating the continued detention of the detenu; on the other hand, if the Court is satisfied that the delay was occasioned not by any lack of diligence or promptness of attention on the part of the party concerned, but due to unavoidable circumstances or reasons entirely beyond his control, such delay will not be treated as furnishing a ground for the grant of relief to the detenu against his continued detention.<sup>1</sup>

### 16.32. *Unexplained delay in deciding representation.*

It is now well settled that any unexplained delay in deciding the representation filed by the detenu amounts to a clear violation of Article 22 (5) of the Constitution of India and is sufficient to vitiate the detention.<sup>2</sup>

### 16.33. *Representation to be delt with early.*

It is settled law that the appropriate authority is bound to give an opportunity to the detenu to make representation and to consider the representation of the detenu as early as possible. There should not be any delay in the matter of consideration.

In *Jayanarayan Sukul v. State of West Bengal*,<sup>3</sup> the Supreme Court held that the fundamental right of the detenu to have representation considered by the appropriate government will render meaningless if the government will not deal with the matter expeditiously. The appropriate authority is bound to consider the representation of the detenu as early and as expeditiously as possible. The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities.<sup>4</sup>

In *Mehdi Mohamed v. State of Maharashtra*<sup>5</sup> and *Virendra Singh v. State of Maharashtra*<sup>6</sup> short delay in disposing of the representation was considered fatal to the order of detention.

1. *Raisuddin v. State of U. P.*, (1983) 4 SCC 537 (540).

2. *Pabitra Rana v. Union of India*, 1980 SC 798 (798); *Narendra Purshottam v. Guiral*, 1979) 2 SCR 315 : 1979 SC 420; *Pankaj Kumar v. State of West Bengal*, (1970) 1 SCR 543 : 1970 SC 97.

3. 1970 SC 675.

4. *Ram Chandra A. Kamat v. Union of India*, (1980) 2 SCC 270 (272).

5. 1981 SC 1752 (one moth).

6. 1981 SC 1909 (more than a month).

### 16. 34. *Detenu and Fundamental rights.*

In *Francis Coralie v. Union Territory*,<sup>1</sup> the question which arose was whether a person preventively detained in a prison had any rights which he could enforce in a Court of law. Once his freedom was curtailed by incarceration in a jail, did he have any fundamental rights at all or did he leave them behind, when he entered the prison gate? It was held by the Supreme Court in the two *Sunil Batra* cases that "fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration." The prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. Even before the two *Sunil Batra* cases, this position was impliedly accepted in *State of Maharashtra v. Prabhakar Pandurang*,<sup>2</sup> and it was spelt out clearly and in no uncertain terms by Chandrachud, J in *D. B. M. Patnaik v. State of Andhra Pradesh* :<sup>3</sup>

"Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to "practise" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment, likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law."

This statement of the law was affirmed by a Bench of five Judges of the Supreme Court in the first *Sunil Batra* case<sup>4</sup> and by Krishna Iyer, J. speaking on behalf of the Court in the second *Sunil Batra* case.<sup>5</sup> Krishna Iyer, J., in the latter case proceeded to add, "the jurisdictional reach and range of this Court's writ to hold prison caprice and cruelty in constitutional leash is incontestable" and concluded by observing: "Thus it is now clear law that a prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through writ aid. The Indian human has a constant companion the Court armed with the Constitution." It is interesting to note that the Supreme Court of the United States has also taken the same view in regard to rights of prisoner. Mr. Justice Douglas struck a humanistic note when he said in the *Eve Poll's*<sup>6</sup> case :

"Prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedure that satisfy all the requirements of due process."

So also in *Charles Wolff's*<sup>7</sup> case Mr. Justice White made the same point in emphatic terms :

1. 1981 SC 746 (751).
2. (1966) 1 SCR 702 : 1966 SC 424.
3. (1975) 2 SCR 24 : 1974 SC 2092 (2094).
4. (1978) Cri. LJ 1741.
5. (1980 Cri. LJ 1099).
6. (1974) 41 L. ed. 2d p. 495.
7. 41 L. ed 2d p. 935.



"But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."

Mr. Justice Douglas reiterated his thesis when he asserted :

"Every prisoner's liberty is, of course circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a non-person whose rights are subject to the whim of the prison administration, and therefore, the imposition of any serious punishment within the prison system requires procedural safeguards."

Mr. Justice Marshall also expressed himself clearly and explicitly in the same terms :

"I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the courts holding that the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process protection."

What is stated by these learned Judges in regard to the rights of a prisoner under the Constitution of the United States applies equally in regard to the rights of a prisoner or detenu under our constitutional system.<sup>1</sup> It must, therefore, now be taken to be well settled that a prisoner or detenu is not stripped of his fundamental or other legal rights, save those which are inconsistent with his incarceration, and if any of these rights are violated, the Court which is to use the words of Krishna Iyer, J., "not a distant abstraction omnipotent in the books but an activist institution which is the cynosure of public hope", will immediately spring into action and run to his rescue."

### 16.33. *Grounds to be communicated without delay.*

In *Ganga v. Government of Maharashtra*<sup>2</sup> there was unreasonable delay of more than a month in supplying the copies to the detenu, of the material that had been relied upon or referred to in the "grounds" of detention. There was thus an infraction of the constitutional imperative that in addition to the supply of the grounds of detention, all the basic material relied upon or referred to in those "grounds" must be supplied to the detenu with reasonable expedition to enable him to make a full and effective representation at the earliest. Of course, what is "reasonable expedition" is a question of fact depending upon the circumstances of the particular case.

The requirement of communication of grounds of detention acts as a check against, arbitrary and capricious exercise of power, and secondly the detenu has to be afforded an opportunity of making a representation against the order of detention. The communication of the grounds of detention, is therefore also intended to subserve the purpose of enabling the detenu to make an effective representation.<sup>3</sup>

1. *Francis Coralie v. Union Territory*, 1981 SC 748 (751).

2. 1980 SC 1744 (1749).

3. *Khudi Ram v. State of West Bengal*, 1975 SC 550 (554).

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order.<sup>1</sup>

It is principled and pragmatic, flexible but firm and enforces the right to be heard without overloading the administrative process with judicial trappings. This fundamental constitutional mandates are that the authority shall communicate to the detainee the grounds on which the order has been made.

Grounds within the contemplation of Section 8 (1) of the MISA means "materials" on which the order of detention is primarily based. Apart from conclusions of facts "grounds" have a factual constituent, also. They must contain the pith and substance of primary facts but not subsidiary facts or evidential details. The basic facts as distinguished from factual details should be incorporated in the material communicated to the detenu.<sup>2</sup>

In *Haradhan Saha* case<sup>3</sup> it was observed that under the Preventive Detention Act, 1950, it was an established rule that a detenu had a right to be apprised of all the materials on which an order of detention was passed or approved. This observation was explained in *Khudi Ram Das v. State of W. B.*<sup>4</sup> a case under the Maintenance of Internal Security Act, 1971 Bhagwati, J. speaking for the Court said: "When the court made these observations what it had in mind was that all the materials constituting the grounds of detention must be communicated to the detenu and not other particulars communicated to the State Government under Sec. 3 subsection (3) which do not form the basis of the making of the order of detention or its approval should be disclosed to the detenu. The Court could not have intended to say that in addition to the grounds of detention other particulars mentioned in Sec. 63, sub-section (3) should also be communicated to the detenu when there is requirement to that effect either in Art. 22 (5) of the Constitution or many provision of the Act".

A catena of decisions of the Supreme Court has firmly established the rule that one of the constitutional imperatives embodied in Article 22 (5) of the Constitution is that all the documents and materials relied upon by the detaining authority in passing the order of detention must be supplied to the detenu, as soon as practicable, to enable him to make an effective representation.<sup>5</sup> Recently, in *Smt. Ichhu Devi Choraria v. Union of India*<sup>6</sup> the Supreme Court reiterated the principle as follows :

"One of the basic requirements of clause (5) of Article 22 is that the authority making the order of detention must, as soon as may be, communicate to the detenu the grounds on which the order of detention has been made and under sub-section (3) of Section 3 of the COFEPOSA Act, the words "as soon as may be" have been translated to mean "ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days, from the date of detention." The grounds of detention must therefore be furnished to the detenu ordinarily within five days from the

1. Constitution of India, Art. 22 (5).
2. *Vakil Singh v. State of J. & K.*, 1974 SC 2337.
3. *Haradhan Saha v. State of W. B.*, 1974 SC 2154.
4. 1975 SC 550 (553).
5. 1981 SC 728.
6. 1980 SC 1983.

date of detention, but in exceptional circumstances and for reasons to be recorded in writing the time for furnishing the grounds of detention may stand extended but in any event it cannot be later than fifteen days from the date of detention. The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all, that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable right to the detenu to make a representation which right is frustrated by handing over to him the grounds of detention in an *alien* language. The Supreme Court further held that the requirement of explaining the grounds to the detenu in his own language was not complied with.<sup>1</sup>

In *Lalhi Bhai Jogibhai v. Union of India*<sup>2</sup> the detenu did not know English. The grounds of detention, which were served on the detenu, had been drawn up in English. It is true that Police Inspector, who served the grounds of detention on the detenu, had filed an affidavit stating that he had fully explained the grounds of detention in Gujarati to the detenu. But, that was not a sufficient compliance with the mandate of Article 22 (5) of the Constitution, which requires that the grounds of detention must be "communicated" to the detenu. "Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the 'grounds' should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the 'ground' to the detenu is to enable him to make a purposeful and effective representation. If the 'grounds' are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22 (5) is infringed.

#### 16.34. *Effect of non-communication.*

If any factual components constituting the real grounds for detention have not been fairly and fully, put across to the detenu so as to enable him to make an effective answer or where it appears that the detaining authority had taken into consideration materials which were not communicated to the detenu the order of detention would be invalid as being in contravention not only of the statutory protection under Sect. 8 of the MISA but also at the constitutional guarantee under Art. 22 (5). The fact that the petitioner was a "desperate and dangerous character and veteran copper wire stealer"<sup>3</sup> or a "notorious wagonbreaker".

#### 16.35. *Material particulars not communicated.*

In *Shaik Hanif v. State of W. B.*<sup>4</sup> material particulars of the grounds of detention which were necessary to enable the detenu to make an effective representation, were not communicated to him, and the Supreme Court quashed the detention order as being violative of Article 22 (5) of the Constitution.

1. 1971 SC 265.

2. *Mohd. Alam v. State of West Bengal*, 1974 SC 917.

3. *Krishna Lal Dutta v. State of West Bengal*, 1974 SC 953 (957).

4. 1974 SC 679.

Assuming, however, that there was some infirmity or vagueness in some parts of the documents containing the grounds, can it be said that it was of such a kind as to vitiate the detention orders? The principles laid down in *Talpa.de's* case,<sup>1</sup> was with reference to grounds some of which were good and the others extraneous to the purposes for which detention could be ordered. In a number cases the Supreme Court held that vagueness of grounds given for detention would vitiate detention order.<sup>2</sup>

It must be remembered that the Supreme Court in *Moti Lal Jain v. State of Bihar*<sup>3</sup> was dealing with the liberty of a citizen of country. The power given to the State under the Act is an extraordinary power. It is exercisable under special conditions and is subject to definite limitations. The nature of the power is such that the liberty of an individual can be deprived on the subjective satisfaction of the prescribed authority that there is sufficient cause for his detention. A detenu has not the benefit of a regular trial or even an objective examination of the accusations made against him. As observed by the Supreme Court in *Dr. Ram Krishna Bhardwaj v. State of Delhi*<sup>4</sup> preventive detention is a serious invasion of personal liberty and such safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In that case this Court further laid down that under Article 22 (5) of the Constitution as interpreted by this Court, a person detained under the Act, is entitled, in addition to the right to have the ground of his detention communicated to him, to a further right to have particulars as full and adequate as the circumstances permit furnished to him as to enable him to make representation against the order of detention and the sufficiency of the particulars conveyed in the second communication is a justiciable issue, the test being whether they are sufficient to enable the detained person to make representation which on being considered may give him relief. It is also laid down in that decision that the constitutional requirement that the grounds must not be vague must be satisfied with respect to each of the grounds communicated to the person detained subject to the claim of privilege under Clause (6) of Art. 22 of the Constitution, and where one of the grounds mentioned is vague, even though the other grounds are not vague the detention is not in accordance with the procedure established by law and is therefore illegal.<sup>5</sup>

### 116.36. Internal security.

Internal Security is an expression of width sufficient to comprehend the concept of public order.

Internal disturbance can threaten the security of the State and, such disturbance may assume grave proportions, so as have a direct impact on public order.<sup>6</sup>

### 16.37. Advisory Board.

“(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

1. 1943 FC 1.

2. *Ram Krishna Bhardwaj v. State of Dehli*, 1953 SCR 708 : 1953 318 ; *Motilal Jain v. State of Bihar*, 1968 SC 159 ; *Misrilal Jain v. District Magistrate, Kamrup*, (1971) 3 SCC 693 ; *Rameshwar Lal v. State of Bihar*, 1968 SC 1302 ; *State of Bombay v. Atma Ram Sridhar Vaidya*, 1951 SC 157.

3. 1968 SC 1509.

4. 1953 SC 318.

5. *Moti Lal Jain v. State of Bihar*, 1968 SC 1509 (1512) para 8.

6. *Abdul Aziz v. District Magistrate*, 1973 SC 770 (772).

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7) ; or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clause (a) and (b) of clause (7).<sup>1</sup>

The detention in *Nirmal Kumar v. Union of India*,<sup>1</sup> was challenged mainly on the ground that no order under Cl. (f) of Sec. 8 of the Act confirming the detention was passed by the appropriate Government within three months of the commencement of the detention and, as such, the continuance of the detention beyond the initial period of three months was violative of the mandate of Art. 22 (2) of the Constitution.

The Supreme Court followed the decision of in *Ujjai Mandal's*<sup>2</sup> case, where Mathew, J., speaking for the Court said :

"Article 22 (4) of the Constitution has specified the maximum limit of initial detention, and detention for a longer period than 3 months can only be made on the basis of the report of the Board. The Act authorises a possible detention of more than 3 months. It is because the appropriate Government wants to detain a person for more than 3 months that the matter is referred to the Board and it is only when the Board makes its report that the appropriate Government can fix the period of detention under sub-section (1) of Sec. 12. So when the Government receives the report of the Board stating that there is sufficient cause for detention of a person, if the Government wants to detain him for a period beyond 3 months, it has to pass an order or make a decision under Section 12 (1) to confirm the order of detention."

The expression "may confirm" in Cl. (f) of Sec. 8 is significant. It imports a discretion. Even where the Advisory Board makes a report that in its opinion, there is sufficient cause for the detention concerned, the Government may not confirm the detention order. Read in the light of Article 22 (4) of the Constitution and the context of the words "continue the detention", they definitely lead to the conclusion that the sine qua non for continuing the detention made beyond the period of three months, is the confirmation of the detention order by the appropriate Government. Conversely, the non-confirmation of the initial order by the appropriate Government before the expiry of the period of three months' detention, shall automatically result in revocation and termination of the legal authority for its continuance.<sup>3</sup> These words put it beyond doubt that if the initial order of detention is not confirmed by the appropriate Government within three months of the date of the detention, the detention after the expiry of that period ipso facto becomes unauthorised and illegal. It is true that in certain situation when the Advisory Board makes its report in favour of the detention just before the expiry of 11 weeks from the date of the detention, the time left to the Government for taking a decision as to the confirmation of the detention and its continuance would be hardly two weeks. That only shows the anxiety on the part of the legislature to ensure that the Government continues the preventive detention of a person beyond

1. *Nirmal Kumar v. Union of India*, 1978 SC 1155 (1156).

2. 1972 SC 1446.

3. *Nirmal Kumar v. Union of India*, 1978 SC 1155 (1166).

three months after due application of mind and for that purpose acts with utmost promptitude. The law does not lend its authority to the continuance of the detention even for a day more than the initial period of three months if the Government does not take a decision for that purpose on the report of the Advisory Board within three months of the commencement of the detention.

#### 16.38. *Proceedings before Advisory Board.*

In *A. K. Roy v. Union of India*<sup>1</sup> the Supreme Court rejected the plea that the proceedings of the Advisory Board should be thrown open to the public. The right to a public trial is not one of the guaranteed rights under our Constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as a speedy, trial. Even under the American Constitution, the right guaranteed by the 6th Amendment is held to be personal to the accused, which the public in general cannot share. Considering the nature of the inquiry which the Advisory Board has to undertake, it can not be said that the interest of justice will be served better by giving access to the public to the proceedings of the Advisory Board.

On a combined reading of clauses (1) and (3)(b) of Art. 22, it is clear that the right to consult and to be defended by a legal practitioner of his choice, which is conferred by clause (1) is denied by clause (3) (b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him.<sup>2</sup> To read the right of legal representation in Art. 22 (5) would be restraining the language of that Article. Clause (5) confers upon the detenu the right to be informed of the ground of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board.<sup>3</sup> The rights available to an accused in a criminal trial can not be extended to the proceedings of Advisory Boards in order to determine the rights of detenus in relation to those proceedings.<sup>4</sup> The Court distinguished the case of *Francis Coralie Mullin v. Union Territory*<sup>5</sup> and did not say anything about the correctness of that decision.<sup>6</sup>

The reason behind the provisions contained in Article 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. Permitting the detaining authority of the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal advisor would be in breach of Article 14, if a similar facility is denied to the detenu. If the detaining authority or the Government takes the aid of a legal practitioner or a legal advisor before the Advisory Board the detenu must be allowed the facility of appearing before the Board through a legal practitioner. The embargo on the appearance of legal practitioner should not be extended so as to prevent the detenu from being aided or assisted by a friend,<sup>7</sup> who, in truth and substance, is not a legal practitioner. Every person

1. 1982 SC 710 (752).

2. *A. K. Roy v. Union of India*, 1982 SC 710 (744).

3. *Ibid.*, p. 745.

4. *Ibid.*, p. 746.

5. 1981 SC 746.

6. *A. K. Roy v. Union of India*, 1982 SC 710 (747-48).

7. *Ibid.*, p. 747.

whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. It may be that denial of legal representation is not denial of natural justice *per se*, and therefore of a statute excludes that facility expressly, it would not be open to the tribunal, to allow it, fairness, as said by Lord Denning M. R. in *Maynard v. Osmond*<sup>1</sup> can be obtained without legal representation.

In *A. K. Roy v. Union of India*<sup>2</sup> the question was whether the detenu could claim a right of cross-examination in the proceedings before the Advisory Board. Chandrachud, C.J. denying this right said : "It seems difficult to hold that a detenu can claim the right of cross-examination in the proceeding before the Advisory Board. First and foremost, cross-examination of whom ? The principle that witness must be confronted and offered for cross-examination applied generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross-examination then becomes a powerful weapon for showing the untruthfulness of that evidence. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has, therefore, to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a list to adjudicate upon.

Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraint of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence. The Advisory Board is under an obligation under Section 11 (1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.

It is a matter of common experience that in cases of preventive detention, witnesses are either unwilling to come forward or the sources of information of the detaining authority cannot be disclosed without detriment to public interest. Indeed, the disclosure of the identity of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination. It is, therefore, difficult in the very nature of things, to give to the detenu the full panoply of rights which an accused is entitled to have in order to disprove the charges against him. That is the importance of the statement that the con-

1. (1977) 1 Q.B. 240 (253).
2. 1982 SC 710 (749).

cept of what is just and reasonable is flexible in its scope and calls for such procedural protections as the particular situation demands. Just as there can be an effective hearing without legal representation even so there can be effective hearing without the right of cross-examination. The nature of the inquiry involved in the proceeding in relation to which these rights are claimed determines whether these rights must be given as components of natural justice.<sup>1</sup>

### 16.36. Treatment of detenu.

It is difficult to frame a Code for the treatment of detenus while they are held in detention. That will involve an exercise which calls for examination of minute details. The Court will have to examine each case as it comes before it, in order to determine whether the restraints imposed upon the detenu in any particular case are excessive and unrelated to the object of the detention. If so, they shall have to be struck down. The basic commitment of our Constitution is to foster human dignity and the well-being of our people. In recent times, the Court had many an occasion to alert the authorities to the need to treat even the convicts in a manner consistent with human dignity. The judgment of Krishna Iyer, J. in *Sunil Batra v. Delhi Administration*,<sup>2</sup> is an instance in point. It highlights that place of incarceration are "part of the Indian earth" and that, "the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority'". The Supreme Court had impressed upon the Government that the detenu must be afforded all reasonable facilities for an existence consistent with human dignity. The Court did not find any reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements. Books are the best friends of man whether inside or outside the jail.

### 16.42. Detenu to consult a legal adviser.

The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21.

In *Francis Coralie v. Union Territory*,<sup>3</sup> the legal adviser under the rules could have interview with the detenu only by prior appointment after obtaining the permission of the District Magistrate. The Supreme Court held that the rule regulating the right of a detenu to have interview with a legal adviser of his choice was violative of Articles 14 and 21 and as such unconstitutional and void. It would be quite reasonable if a detenu were to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. The

1. *A. K. Roy v. Union of India*, 1982 SC 710 (749) para 100.

2. (1980) 2 SCC 557 : AIR 1980 SC 1579.

3. 1981 SC 754 (755).



interview need not necessarily take place in the presence of a nominated officer of Customs, Central Excise etc. but if the presence of such officer can be conveniently secured without involving of any postponement of the interview, then such officer and if his presence is not so secured, then any jail official may, if thought necessary watch the interview but not so as to be within hearing distance of the detenu and the legal adviser.

**16.43 Sub-clause (6).**

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.<sup>1</sup>

Under Article 22 (6) the authorities are permitted to withhold facts which they consider not desirable to be disclosed in the public interest. It was argued that, therefore, all other facts must be disclosed. The Supreme Court held that it is not the necessary conclusion from the wording of Article 22(6). It gives a right to the detaining authority not to disclose such facts, but from that it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed, there is a breach of a fundamental right. A wide latitude is left to the authorities in the matter of disclosure. They are given a special privilege in respect of facts which are considered not desirable to be disclosed in public interest. As regards the rest, their duty is to disclose facts so as to give the detained person the earliest opportunity to make representation against the order of detention.<sup>2</sup>

Articles 22 (6) of the Constitution provides that nothing in clause (5) shall require an authority making an order of detention, to disclose facts, which such authority considers to be against public interests. The District Magistrate may not disclose the intelligence reports or the history-sheet.<sup>3</sup>

**16.44 Sub-clause (7).**

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).<sup>4</sup>

Under Article 22(4) no law providing, for preventive detention can authorise detention for a period longer than three months unless an Advisory Board consisting of persons with qualifications set out therein has reported before the expiration of three months that there is in its opinion sufficient cause for such

1. *Constitution of India*, Art. 26 (6).

2. *State of Bombay v. Aima Ram*, 1957 SC 157 (168).

3. *Wasiuddin v. District Magistrate*, 1981 SC 2166 (2175) *Khudiram Das v. State of West Bengal*, 1975 SC 550.

4. *Constitution of India*, Art. 26 (7).

detention. Even when there is such a report, no person can be detained beyond the maximum period prescribed by any law made by Parliament under clause 7 (b) of the Article. The policy of Article 22 is except where there is a Central Act to the contrary passed under Clause 7 (a), to permit detention for a period of three months only, and the detention in excess of that period is permissible only in those cases where an Advisory Board, set up under a relevant statute, has reported as to the sufficiency of the cause for such detention. The fact that the report of such an Advisory Board has to be obtained before the expiry of three months from the date of detention shows that the maximum period within which the detaining authority can on its own satisfaction detain a person is three months. If such detention is to continue thereafter, it can be done only where there is the report of the Board certifying the sufficiency of the cause for detention.<sup>1</sup>

The Supreme Court, in several cases was called upon to consider whether it was obligatory on the Parliament to prescribe the maximum period of detention under clause (7) sub-clause (b), if the detention was to be made for a longer period than three months under sub-clause (a) of Clause 4.

In *A.K. Gopalan v. State of Madras*,<sup>2</sup> Kania, C.J. said that Art. 22 (7)(b) was permissive, it being not obligatory on Parliament to prescribe the maximum period, and if that construction resulted in a Parliamentary law enabling the detention of a person for an indefinite period without trial, that unfortunate consequence was the result of the words of Art. 22 (7) itself and that the Court could do nothing about it. In *Krishnan v. State of Madras*,<sup>3</sup> Section 11 of the Preventive Detention (Amendment) Act, 1951 was impugned as violative of Art. 22 (4) (a) on the ground that Section 11 did not fix a maximum period of detention but on the contrary, empowered the government in express terms to order that the detenu was to continue in detention for such period as it thought fit. Mahajan, J., regarded the point as concluded by the majority decision in *Gopalan's* case (supra). This view was shared only by S.R. Das, J., Bose, J., in his dissent held that though it was not obligatory on Parliament to fix the maximum period of detention under Art. 22 (7) (b) if it wanted to detain a person for a period longer than three months it could only do so by providing in the Act the maximum period of detention. The Court by majority held that section 11 was not invalid on the ground that it did not fix the maximum period of detention in as much as the Act was to be in force for a period of one year and no detention under the Act could be continued after the expiry of the Act.<sup>4</sup>

In the *State of West Bengal v. Ashok Dey*,<sup>5</sup> the central issue was whether a State Legislature had power to pass a law providing for preventive detention of a person for a period longer than three months, unless the Parliament had prescribed the maximum period of detention under Art. 22 (7) (b). The Court negatived the contention that there was no such power and said that Art. 22 (7) was couched in a permissive way and there was nothing mandatory about it. The Court came to the conclusion that there was no limitation on the power of a State Legislature to make a law providing for detention for a period beyond three months for the reason that the Parliament had not made a law prescribing the maximum period of detention under Art. 22 (7) (b). According to Bose, J. in his dissenting judgment in

1. *Shibapada Mukherjee v. State of W. B.* (1974) 3 SCC 50 (53).

2. 1950 SCR 88 : 1950 SC 27 ; *Fagu Shaw v. State of W. B.*, 1974 SC 613,

3. 1951 SCR 621 : 1951 SC 301.

4. *Fagu Shaw v. State of W. B.*, 1974 SC 613 (616).

5. 1972 SC 1660 : (1972) 1 SCC 199.

*Krishna's case* 'A law providing for detention of a person beyond a period of three months must satisfy either clause (4)(a) or clause (4)(b) of Article 22. The learned Judge was not, however, prepared to read the word 'may' in clause (7) of Article 22 as meaning 'must' as that would change the usual meaning of the word. He was of the view that Parliament is free to prescribe or not to prescribe the maximum period of detention under Article 22 (7) (b) and that neither Parliament nor State legislature can be compelled to pass a law authorising preventive detention beyond three months but, if, however, either wishes to do so, then it is bound to conform to the provisions of either sub-clause (a) or (b) of Article 22 (4) or both, and that in the case of sub-clause (a), the proviso is as much a part of the sub-clause as its main provision. The learned Judge then said that if no maximum limit is prescribed under sub-clause (b) of Article 22 (7), the proviso to Article 22 (4) (a) cannot operate, and, if it cannot operate, no legislative action can be taken under clause (4) (a).'<sup>1</sup>

The question again was raised before the Court in *Fagu Shaw v. State of West Bengal*,<sup>2</sup> Ray, C. J., Mathew & Chandrachud, JJ., accepted the view expressed in the earlier cases and held that they could not import an obligation that Parliament "shall" by law prescribe the maximum period of detention. About the dissenting judgment of Bose, J., they said that "The analogies to which the learned Judge referred to were, in fact, misleading and his reasoning from them not convincing". Bhagwati, J., agreed with the judgment of Bose, J. and did not feel bound by the earlier judgments. He differing from the majority judgment held : "Parliament was free to prescribe or not to prescribe a maximum period under Clause (7) sub-clause (b). It was under no obligation to do so. But if no maximum period was prescribed, neither the Parliament nor the State Legislature could authorise detention for a longer period than three months either under sub-clause (a) or sub-clause (b) of Clause (4). If the Parliament or the State Legislature wished to authorise detention for a period longer than three months, maximum period must be prescribed by law. There can be no detention for a period longer than three months unless the maximum period of detention was prescribed by Parliament under Clause 7 sub-clause (b).

Section 13 of the MISA as it originally stood run as follows :

"The maximum period for which any person may be detained in pursuance of any detention order which has been conferred under Section 12 shall be twelve months from the date of detention".

After it was amended by Section 6 (b) of the Defence of India Act, 1971. The material part of Section 13 reads :

"The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 shall be twelve months from the date of detention or until the expiry of the Defence of India Act, 1971 which ever is later".

The Defence of India Act, 1971 came into force on December 9, 1971 and remained in force during the operation of the proclamation of Emergency (issued under clause 1 of Art. 352 of the Constitution on the 3rd December, 1971) and for period of six months thereafter .

Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases detained under any law providing

1. *Fagu Shaw v. State of W. B.*, 1974 SC 613 (616).
2. 1974 SC 613.

for preventive detention.<sup>1</sup> In *Fagu Shaw v. State of West Bengal*<sup>2</sup> the argument was that the expression maximum period connotes a definite period reckoned in terms of years months or days and that no period could be said to be maximum period unless it was possible to predict its beginning and end in terms of years, months or days and that since the determination of the period of detention, namely the expiry of Defence of India Act, 1971 was dependant upon revocation of the Proclamation of Emergency, the period fixed under Section 13 of the Act was not the maximum period. The Supreme Court, (Ray, C. J., Mathews, Algiri Swami and Chandrachud, JJ.) (Bhagwati, J. dissenting) rejected the contention. The same view again was taken by the Supreme Court in *Mohd. Alam v. State of W. B.*<sup>3</sup>

When any person is arrested, he is deprived of his liberty, the procedure laid down in clause (1) of Act, 22 must then be followed, and he must be allowed the right to be defended by counsel of his choice. No law which permits deprivation of his personal liberty by arrest can deny him this right. Why should this right be limited to a trial in which he may be sentenced to death or to a term of imprisonment. Why should this right be denied to him in a trial in which he is in jeopardy of being convicted and sentenced to a heavy fine? The clear words of Article 22 furnish no basis for this limitation. The right to be defended by counsel is not limited to a trial in which the arrested person is in jeopardy of being sentenced to death or to a term of imprisonment.<sup>4</sup>

#### 16.45. Preventive detention and criminal trial.

The liability of the detenu also to be tried for commission of an offence or to be proceeded against under Chapter VIII of the Code of Criminal Procedure does not in any way as a matter of law affect or impinge upon the full operation of the Act.<sup>5</sup> Judicial trial for punishing the accused for the commission of an offence as also preventive security proceedings in a Criminal Court against a person merely for keeping the peace, or for good behaviour under Chapter VIII of the Code of Criminal Procedure is a jurisdiction distinct from that of detention under a Preventive Detention Act, which has in view, the object of preventing the detenu from acting in a manner prejudicial *inter alia* to the security of the State or maintenance of public order.<sup>6</sup> The fields of these two jurisdictions are not co-extensive nor are they alternative.

A case under the Code of Criminal Procedure depends upon the proof of objective facts which have already taken place. Whereas a case under the Act providing for preventive detention depends upon the subjective satisfaction of the authorities concerned of the likelihood of the person to be detained to act in future in a manner similar to the one seen from his past acts. The fact, therefore, that a prosecution under the Code of Criminal Procedure could have been launched is not a valid ground for saying that it precludes the authority from acting under the Act.<sup>7</sup>

1. Constitution, Art. 22 (7) (b).

2. 1974 SC 613.

3. 1974 SC 917.

4. *State of M. P. v. Shobha Ram*, 1966 SC 1910 (1921).

5. *Borjahan Gorey v. State of W. B.*, 1972 SC 2256 (2257).

6. *Haradhan Saha v. State of W. B.*, 1947 SC ; 2154 ; *Ram Krishna Rawat v. District Magistrate* (1975) 4 SCC 164 ; *Suru Mallick v. State of W. B.*, 1974 SC 2305.

7. *Borjahan Gorey v. State of W. B.*, : (1972) 3 SCC 550 (553); 1972 SC 2256.

Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. In the circumstances the pendency of a criminal prosecution is no bar to an order of preventive detention, nor is an order of preventive detention a bar to prosecution. It is for the detaining authority to have the subjective satisfaction whether in such a case there are sufficient materials to place the person under preventive detention in order to prevent him from acting in a manner prejudicial to public order or the like in future.<sup>1</sup>

The mere fact that criminal proceedings in connection with the same incidents had been adopted against a person and he had been discharged by the trying Magistrate did not mean that no valid order of detention could be passed against him in connection with those very incidents or that such an order could for that reason be characterised as *mala fide*. It might well be that a Magistrate trying a particular person under the Code of Criminal Procedure had insufficient evidence before him, and therefore had to discharge such a person. But the detaining authorities might well feel that though there was not sufficient available evidence under the Evidence Act for a conviction, the activities of that person, which they had been watching, were of such a nature as to justify an order of detention. From the mere fact that the Magistrate discharged the petitioner from the criminal case lodged against him, it cannot be said that the impugned order was incompetent, nor can it be inferred that it was without a basis or *mala fide*.<sup>2</sup>

In *Saheb Singh Dugal v. Union of India*,<sup>3</sup> it was contended that the detention order passed under the Defence of India Rules which had empowered the Government of India to make orders of preventive detention was *mala fide*. The reason for the contention was that it was originally intended to prosecute the petitioners under Section 3 of the Official Secrets Act and when the authorities were unable to get sufficient evidence to obtain a conviction they decided to drop the criminal proceedings and to order the detention of the petitioner. But the Supreme Court said: "We cannot infer merely from the fact that the authorities decided to drop the case under the Official Secrets Act." and thereafter to order the detention of the petitioner under the Rules that the order of detention was *mala fide*". This decision was followed by the Supreme Court in *Mohd. Salim Khan v. Bose S. C.*<sup>4</sup>

The argument that if the criminal trial failed or the case was not launched because it was liable to fail, the state had to remain content with the result and it could not deprive the suspected person of his liberty, was again made before the Supreme Court in *Mohd. Subrati v. State of West Bengal*.<sup>5</sup> It was not accepted and it said: "The Act creates in the authorities concerned new jurisdiction to make orders for preventive detention on their subjective satisfaction on grounds of suspicion of commission in future of acts prejudicial to the community in general. This jurisdiction is different from that of the judicial trial in courts for offences and of judicial orders for prevention of offences. Even unsuccessful judicial trial or proceedings

1. *Alijan v. District Magistrate*, 1983 SC 1130 (1132).

2. *Salim Khan v. Bose C.C.*, 1972 SC 1670 : (1972) 2 SCC 607 (609); *Israil v. District Magistrate* 1975 SC 168; *Sri Ramayan v. State of W.B.*, 1973 SC 758; *Milan Banik v. State of West Bengal*, 1974 SC 1214 (1217).

3. (1966) 1 SCR 313 : 1966 SC 310.

4. *Md. Salim Khan v. Bose*, SC, (1972) 2 SCC 607 (609); *Israil v. District Magistrate, W. B.*, 1975 SC 168; *Sri Ramayan Harijan v. State of W. B.*, 1973 SC 758.

5. (1972) 2 SCR 607.

would therefore not operate as a bar to detention order or render it *mala fide*."

In 1974, there appears to be a notifiable change in the approach to this question by the Supreme Court. In *Bhut Nath v. State of West Bengal*,<sup>1</sup> the question whether for the reason that criminal prosecution had failed the detention order was bad was raised before a Bench consisting of Krishna Iyer & Sarkaria, JJ.

The decision in *Mohd. Subrat v. State of West Bengal*,<sup>2</sup> given by a larger Bench was accepted. But Krishna Iyer, J. said : "A note of caution, however needs to be struck since absolute scrupulousness is expected of authorities exercising this exceptional power. This is not a power to put behind bars any one you regard as dangerous or rowdyish or irrepressible or difficult of being got rid of by proof of guilt in court. This is an instrument for protecting the community against specially injurious types of anti-social activities statutorily enunciated. If extraneous motives adulterate the use of power, the court must nullify it. After all, however well-meaning Government may be, detention power cannot be quietly used to subvert, supplant or to substitute the punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom the ordinary law would take care of, merely because it is irksome to undertake the inconvenience of proving guilt in court is unfair abuse. To detain a person after a court has held the charge false is to expose oneself to the criticism of absence of due care and of rational material for subjective satisfaction. After all, the responsible officer, aware of the values of Civil liberty even for undesirable persons, must make a credible prediction of the species of prejudicial acting in Section 3 (1) before shutting up a person. The potential executive tendency to shy at court for prosecution of ordinary offences and to rely generously on the easier strateging of subjective satisfaction is a danger to the democratic way of life".<sup>3</sup>

In *Golam Hussain v. Police Commr.*<sup>4</sup> Krishna Iyer, J. speaking for the court said : "It is no longer a valid contention that because the accused has been discharged in a criminal case the ground of charge cannot be relied upon by the appropriate authority for passing an order of detention. The former relates to the punitive branch of the Criminal law and relates to the past commission, the latter to the preventive branch of social defence and protects the community from future injury. It is now futile for a detenu to urge that because the grounds of detention have been the subject matter of Criminal cases which have ended in discharge and therefore the order of detention is *mala fide*. The basic imperative of proof beyond reasonable doubt does not apply to the "subjective satisfaction" component of imprisonment for reasons of internal security." 'Of course', said Krishna Iyer, J., 'we can visualise extreme cases where a court has held a criminal case to be false and a detaining authority with that judicial pronouncement before him may not reasonably claim to be satisfied about prospective prejudicial activities based on what a court has found to be baseless'.

#### 16.46. Nature of Preventive detention and criminal procedure.

The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a

1. 1974 SC 806.

2. (1973) 3 SCC 250 (254) : 1973 SC 207.

3. *Bhut Nath v. State of W. B.*, 1974 SC 806 (813).

4. 1974 SC 1336 (1339).

parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.<sup>1</sup>

#### 16.47. Preventive detention order when detenu in jail.

It can not be laid down as absolute proposition of law that a valid detention order can not be made in any circumstances against a person in Jail custody.<sup>2</sup> In *Rameshwar Shaw's* case, Gajendragadkar, J. stated that the relevant fact in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It can not be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed upon him. In dealing with this question again the consideration of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment, for a very short period, say a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority in *bona fide* satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The question as to whether an order of detention can be passed against a person who is in detention or in jail will always have to be determined in the circumstances of each case.<sup>3</sup>

There is no legal bar in serving an order of detention on a person who is in jail custody if he is likely to be released soon thereafter and there is relevant material on which the detaining authority is satisfied that if free, the person concerned is likely to indulge in activities prejudicial to the security of the state or maintenance of public order.<sup>4</sup> The decision in *Makhan Singh v. State of Punjab*,<sup>5</sup> does not lay down the broad proposition canvassed. In that case which dealt with the Defence of India Rules it was observed that Rule 30 (1) (b) of these Rules postulates an order only where it is shown that but for the imposition of the detention, the person concerned would be able to carry out prejudicial activities and such a freedom could not be predicated of Makhan Singh Tarsikka, petitioner in that case.

The real hurdle in making an order of detention against a person already in custody is based on the view that it is futile to keep a person in dual custody under two different orders but the objection cannot hold good if the earlier custody is without doubt likely to cease soon and the detention

1. *Haradhan Saha v. State of W. B.*, 1974 SC 2154 (2160); *Biram Chand v. State of U. P.*, 1974 SC 1161 (1165); *Milan Banih v. State of W. B.*, 1974 SC 1214 (1257); *Satish Chowdhary v. State of W. B.*, 1972 SC 1668.

2. *Rameshwar Shaw v. District Magistrate*, 1964 SC 334 (338).

3. *Ibid.*, p. 338

4. *Masood Alam v. Union of India*, 1973 SC 899 (901).

5. 1964 SC 1120.

order is made merely with the object of rendering it operative when the previous custody is about to cease.<sup>1</sup> In *Ramu Krishna Rawat v. D. M.*<sup>2</sup> the petitioner was in jail custody in proceedings under Section 151 Cr. Pr. Code. That custody was obviously of a short duration. The mere service of the detention order on the petitioner of jail, observed, the Supreme Court, would not therefore invalidate the order. On the basis of the antecedent activities of the petitioner in the proximate past the detaining authority could reasonably reach its subjective satisfaction about his tendency or inclination to act in a manner prejudicial to the maintenance of public order, after his release on the termination of the security proceeding under the Code''.

1. 1964 SC 1120.

2. *Ramkrishna Rawat v. District Magistrate*, 1975 (4) SCC 764 (169); *Kartik Chandra v. State of W. B.*, 1974 SC 2149 (likely to be released on bail).



## Prohibition of traffic in Human beings and forced labour and Prohibition of employment of children in factories etc.

### S Y N O P S I S

- 17.1. Forced Labour.
- 17.2. Peonage or Bonded labour.
- 17.3. State's right regarding involuntary servitude.
- 17.4 Traffic in Human beings and Begar.
- 17.5. Begar.
- 17.6. Bonded Labour Act.

#### 17.1. *Forced Labour.*

Forced labour in some special circumstances may be consistent with the general basic system of free labour. Force has been sustained as a means of punishing crime, and there are duties such as work on high ways which society may compel. Though traffic in human beings and *beggars* and other similar forms of forced labour have been prohibited by the Indian Constitution, the State is not prevented from imposing compulsory service for public purposes, but in imposing such service the State is not to make any discrimination on grounds only of religion, race, caste or class or any of them. Similarly the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defence of the rights and honour of the nation as the result of a war cannot be said to be the imposition of involuntary servitude.<sup>1</sup>

Involuntary servitude is an action by the master causing the servant to have or to believe he has, no way to avoid continued service or confinement but not a situation where the servant knows has a choice between continued service and

1. Jagadish Swarup: *Human Rights and Fundamental Freedoms*, p. 164.

freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad.<sup>1</sup>

Every form of forced labour, begar or otherwise, is within the inhibition of Art. 23 and it makes no difference, whether the person who is forced to give his labour or services to another is remunerated or not. Even if remuneration is paid labour supplied by a person would be hit by this Article if it is forced labour that is, labour supplied not willingly but as a result of force or compulsion.<sup>2</sup>

#### 17.2. *Peonage or Bonded Labour.*

Peonage may be characterised as the compulsory holding of one individual for the purpose of compelling the former, by personal service, to discharge his indebtedness to the latter. One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage.

The peonage is sometimes classified as voluntary or involuntary: but this implies simply a difference, in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage however, created is compulsory service-involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and voluntary performance of labour or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labour or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it and no law or force compels performance or a continuance of the service.<sup>3</sup>

#### 17.3 *State's right regarding involuntary servitude.*

There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may compel one man to labour for another in payment of a debt by punishing him as a criminal if he did not perform the service to pay the debt.

#### 17.4. *Traffic in Human beings and Begar.*

Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.<sup>4</sup> But the State is not prevented from imposing compulsory service for public purposes and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.<sup>5</sup>

1. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 166.

2. *People's Union for Democratic Rights v. Union of India*, 1982 SC 1473 (1488).

3. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 166.

4. *Constitution of India*, Art. 23 (1).

5. *Ibid.*, Art. 23(2).

17.5. *Begar.*

The clause 23 (1) prohibits (i) traffic in human being (ii) begar and (iii) other similar forms of forced labour. It would be seen that every form of forced labour is not prohibited by the clause. In fact, clause (2) of Article 23 permits the State to impose on the citizens compulsory service for public purposes. What is prohibited by the first clause is imposing on the citizens forced labour which is similar in form to begar. It is true that begar is not defined but it is a well understood term which means making a person work against his will and without paying any remuneration therefor. Molesworth at page 580 gives the meaning of begar as 'Labour or service exacted by a Government or a person in power without giving remuneration for it.' In Wilson's Glossary the meaning of the word is given as 'Forced labour, one pressed to carry burden for individual or to public; under old system when pressed for public service, no pay was given.' To bring the case within the mischief which clause (1) of Article 23 provides against, it must be established that a person is forced to work against his will and without payment.<sup>1</sup>

Traffic in women for immoral purposes has been held to be covered by the expression "traffic in human beings" in Art. 23 (1) of the Constitution of India.<sup>2</sup> This means that Parliament alone could legislate for prescribing punishments for the offences contemplated by Art. 23 of the Constitution of India. If there is any conflict between a fundamental right guaranteed under Art. 19 of the Constitution and what is prohibited under Art. 23 the prohibition contained in the latter Article will prevail over the fundamental right conferred by the former article.<sup>3</sup>

Article 23 of the Constitution of India prohibits 'Begar'. To ask a man to work and then not to pay him any salary or wages savour of Begar. It is a fundamental right of a citizen of India not to be compelled to work without wages. In this view of the matter, the stopping of pay and making the teacher to work is not only against the rule but it also offends against the spirit of Article 23 of the Constitution.<sup>4</sup>

Article 23 of the Constitution provides for prohibition of traffic, *inter alia*, in human beings, which would include traffic in women and children for immoral or other purposes.<sup>5</sup>

The petitioners in *Dubari Gola v. Union of India*<sup>6</sup> were paid some remuneration, however insignificant it may be, for their two hours' labour. Further they got the benefit of a reduced licence fee and in addition they were allowed the privilege of free user of the Railway premises for earning their livelihood. In the circumstances the petitioners could not be said to be doing Begar or forced labour within the meaning of Art. 23 (1) of the Constitution of India.<sup>6</sup>

The provision in the Article is engrafted in order to provide a right against exploitation. In *Kedur v. Muthu Koya*<sup>7</sup> petitioner had contracted to do

1. *Vasudevan v. S D. Mittal*, 1962 Bom. 3,(67) ; *Peoples Union for Democratic Rights v. Union of India*, 1982 SC 1473 (1486).

2. *Raj Bahadur v. Legal Remembrance of Govt. of W.B.*, 1953 Cal. 522 (524), *Shamabhai v. State of U. P.*, 1959 All. 62.

3. *Shamabhai v. State of U. P.*, 1959 All. 57 (62).

4. *Suraj Narain v. State of M. P.*, 1960 MP 303 (304).

5. *Raj Bahadur v. Legal Remembrancer*, 1953 Cal. 522 (524).

6. *Dubari Gola v Union of India*, 1953 Cal. 499.

7. 1962 Ker. (138) 144.

personal service and certain properties of the plaintiff had been put in possession of the petitioner on condition of the petitioner performing the personal service. These facts would detract from the final conclusion to be arrived at namely that when the petitioner declined to perform such personal services and the non-performance of such personal services would entail penal consequences under the Madras Regulation, viz., Laccadive Islands and Minicoy Regulation I of 1912, would amount to 'Begar' or at any rate, a similar form of forced labour. The plaintiff could not say that he was only seeking to enforce his rights under the contract. Such a plea would be no answer to the prohibition contained under Article 23 (1).<sup>1</sup>

#### 17.6. Bonded Labour Act.

Parliament has enacted the comprehensive Bonded Labour System (Abolition) Act, 1976, on these premises. This Act defines (Section 2 (g)) the 'bonded labour system' as a system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that, (i) in consideration of an advance obtained by him or any of his ascendants or descendants, or (ii) in pursuance of any customary or social obligation, or (iii) in pursuance of any obligation devolving on him by succession, (iv) by reason of birth in a particular caste or community, or (v) for any economic consideration received by him or by any of his ascendants or descendants, the debtor would be bound to do any of the following acts—

(a) to render to the creditor, for a specified or unspecified period, labour or service to the creditor, by himself or through any member of the debtor's family, without wages or for nominal wages ;

(b) to forfeit his freedom of employment or other means of livelihood ;

(c) to forfeit his right to move freely throughout India ;

(d) to forfeit the right to appropriate or sell at market value any of his property or anything produced by him or his family.<sup>2</sup>

1. *Kadar v. Muthukoya*, 1962 Ker. 144.

2. Basu : *Commentary on the Constitution of India*, p. 186.

## Freedom of conscience and free profession, practice and propagation of religion

### S Y N O P S I S

- 18.1. Secular State.
- 18.2. Religious ideas---General.
- 18.3. Freedom of belief.
- 18.4. Scope of Article 25.
- 18.5. Freedom of conscience.
- 18.6. Religious tolerance.
- 18.7. Ex-communication.
- 18.8. Propagate.
- 18.9. Mahant---Position of.
- 18.10. Limitation on the Freedom
- 18.11. Public Order.
- 18.12. Morality.
- 18.13. State's right to interfere in Religious practice.
- 18.14. Religion---What it means.
- 18.15. Practice of Religion.
- 18.16. Management of Property---Religious denomination.
- 18.17. Essential part of religion.
- 18.18. Integral part of religion.
- 18.19. Article 25 and Section 144 (1) of Code of Criminal Procedure.

#### 18.1. *Secular State.*

Both religion and Government could best achieve their high purposes if each were left free from the other within its respective sphere. Madison thus urged that the "tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the government from interference in any way whatever, beyond the necessity of preserving public order and protecting each sect against trespass on its legal rights by others."

Our Constitution thus provides for a secular government. The fullest realization of true religious liberty, requires that government neither engage in nor compel religious practices, that it effect no favouritism among sects or between religious and non-religion and that it work deterrence of no religious belief.<sup>1</sup>

The most fundamental requirement in a constitutional system designed to secure religious autonomy is that governmental action at least be justifiable in secular terms.

The definition of 'secular' here must be a generous one; if a purpose were to be classified as non-secular simply because it coincided with the beliefs of

1. *Abington School District v. Schempp*, 374 US 203 (305).

one religion or took its origin from another, virtually nothing that government does would be acceptable; laws against murder, for example, would be forbidden because they overlapped the fifth commandment of the Mosaic Decalogue. It is clear, then, that the definition of religion that must be employed in finding a violation of the secular purpose requirement should be that derived from our analysis of the establishment clause. If something is "arguable non-religious", it is sufficiently secular. This low-threshold test might be offensive if the secular purpose requirement were the only one a governmental action need meet in order to be acceptable.<sup>1</sup>

The Court itself has interpreted the secular purpose requirements in much this way. For example, the fact that Sunday closing laws had their origins in religious considerations and that Sunday remains a day of special religious significance for many, has not led the Court to conclude that such laws fail to meet the requirement of secular purpose. On the contrary, the Court said in *McGown v. Maryland*<sup>2</sup> "The present.....effect of most of (these laws) is to provide a uniform day of rest for all citizens" the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals."

Indeed, even in the school prayer cases some Justices were convinced that a secular purpose was at least arguably present.<sup>3</sup> Thus one would expect that in the TM case discussed in *Malnak v. Maharishi Mahesh Yogi*<sup>4</sup>, "even though the free exercise notion of religion should be broad enough to give the practitioner of transcendental meditation a genuine free exercise claim, government has a sufficiently secular purpose to meet an establishment clause objection when it seeks to make TM available in the schools. Appropriately, it has become clear that the Court will usually find in the statutory language or elsewhere a secular purpose for a challenged law, and will then move on to consideration of the remaining two criteria."<sup>5</sup>

As the secular effect requirement has developed the premise of governmental neutrality in religious matters has been held to imply that, while no law may be passed whose primary effect is to aid a particular religion or even religion in general, a law may not be struck down simply because the secular effects government seeks to produce (for example, fire and police protection) happen to be realized in a religious context (for example, preventing arson of a church or robbery of a priest). To strike down a public choice on the sole ground that it incidentally makes religious actions easier or less costly would clearly be to single out religious groups for hostile treatment, contrary to the mandate of the first amendment's free exercise clause: "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favour them".<sup>6</sup>

As the Preamble to our constitution says 'the constitution secure to all its citizen, liberty of thought, belief, faith and worship'. Nothing in Article 16 which provides for equality of opportunity in the matters of public employment shall effect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational

1. Tribe : *American Constitutional Law*, p. 835.

2. 336 US 420.

3. See *Engel v. Vitale*, 370 US 421.

4. File No. 76-241 District Court of New Jersey; para 14-6 ; Tribe : *American Constitutional Law*, p. 836.

5. See *Lemon v. Kurtzman*, 403 US 602 : 29 L ed 2d 345.

6. *Everson v. Board of Education*, 330 US 1.

institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.<sup>1</sup>

### 18.2. *Religious ideas—General.*

Public debate of religious ideas, like any others may arouse emotion. Articles 25 and 26 of the Constitution embody the principle of religious toleration that has been the characteristic feature of Indian civilization from the start of history. Besides they serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution.<sup>2</sup>

### 18.3. *Freedom of belief.*

Freedom of belief guaranteed to the individual by the Constitution is the right to choose his way of life in accordance with his basic beliefs, whether a religious creed or a belief against religion. Freedom of belief is thus more than religious tolerance. It not only allows expression or concealment of the fact and contents of one's belief; the constitution also extends freedom of belief to proselyting for one's own confession, protected activity includes influencing another person to abandon his beliefs without turning to another creed. The constitution does not protect every manifestation of belief, but only those historically developed among civilized people on the basis of certain fundamental moral opinions. The religiously natural state cannot and should not define in detail the content of this freedom, because it is not allowed to evaluate its citizens' belief or non belief. Nevertheless, it must prevent misuse of the freedom. It follows from the constitution's order of values, especially from the dignity of the human being, a misuse is especially apparent whenever the dignity of other person is violated.

Recruiting for a belief and convincing someone to turn from another belief, normally legal activities became misuses of the fundamental right if a person tries, directly or indirectly, to use a base or immoral instrument to lure other persons from their beliefs. A person who exploits the special circumstances of penal servitude and promises and rewards someone with luxury goods in order to make him renounce his beliefs does not enjoy the benefit of the protection of Article 25 and 26 of the Constitution.<sup>3</sup>

### 18.4. *Scope of Article 25*

Article 25 is designated to guarantee freedom of conscience by preventing any degree of compulsion in matter of belief. This Article corresponds to the "free exercise clause" in the American Constitution. Madison in his Memorial and Remonstrance against religious assessments" had said "we held it for a fundamental and undeniable truth that religion or the duty which we owe to our Creator and the manner of discharging it can be directed only by reason and conviction not by force or violence. The rights of conscience are, in the nature, of peculiar delicacy and will little bear the gentlest touch of the governmental hand"<sup>4</sup>

Article 25 of the Constitution guarantees the right to every person, whether citizen or non-citizen, the freedom of conscience and the right of freely to profess, practise and propagate religion. But this guaranteed right is not an absolute one. It is subject to (1) public order, morality and health, (2) the other provisions of Part III of the Constitution, (3) any existing law

1. *Constitution of India*, Art. 16 (5).

2. *Saifuddin v. State of Bombay*, 1962 SC 853 (872); *Zorach v. Clauson*, 96 L. ed. 954.

3. *Ibid.*

4. *Abington School District v. Schempp*, 374 US 203 (231): 10 Led 2d 844 (863).

regulating or restricting an economic, financial political or other secular activity which may be associated with religious practice, (4) a law providing for social welfare and reform, and (5) any law that may be made by the State regulating or restricting the activities aforesaid or providing for social welfare and reform.<sup>1</sup>

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes ;

(b) to manage its own affairs in matter of religion ;

(c) to own and and acquire movable and immovably property ; and

(d) to administer such property in accordance with law.

It is noteworthy that the right guaranteed by Article 25 is an individual right, as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by Article 26.<sup>2</sup>

### 18.5. *Freedom of Conscience.*

Conscience means the sense of right or wrong within the individual.<sup>3</sup> It is in the moral sense the facility of judging the moral qualities of action or of discriminating between right and wrong ; particularly applied to one's perception and judgment of the moral qualities of his own conduct, but in a wide sense, denoting a similar application of the standards of morality to the acts of others. The sense of right and wrong is inherent in every person by virtue of his existence as a social entity. In law, specially the moral rule requires honest dealings between man and man. Moral law has been defined as the law of conscience ; the aggregate of those rules and principles of ethics which relate to right and wrong conduct and prescribe the standards to which the action of men should conform in their dealings with each other.

One of the several stages in the development of morality is the level of conscience, in which the conduct that appears right to the agent is that approved by his own individual judgment of what is right and wrong. At the level of custom the authority in the moral life is outside the individual, he must do what is approved by his group. At the level of conscience the moral authority is inside the individual, it is an inner voice that directs him, and now it is what conscience commands that appears the obvious and proper thing to do.

Social, educational, and religious factors enter into the development of conscience, indeed are requisite to the development. But the conscience is the center of decision in which the free personality constitutes a synthesis of inner and outer moments.

Conscience often does give decisions which are contrary to accepted moral standards, and even contrary to accepted moral standards, and even contrary to what conscience itself directs at the a later stage in its own mental development. The extreme case of this is that of the fanatic who is thoroughly conscientious and obedient to the dictates of his conscience, but whose

1. *Saifuddin v. State of Bombay*, 1962 SC 853 (863).

2. *Ibid.*

3. W. Lillie : *An Introduction to Ethics*, p. 61.



conscience leads him to actions which are almost-universally considered to be wrong.<sup>1</sup>

It is not implied that liberty of conscience is reckless freedom from moral obligation, but is it rather that responsibility of a free spirit which alone can recognize and meet a moral obligation.<sup>2</sup> Our constitution therefore guarantees that all persons are equally entitled to freedom of conscience, but this right is subject to public order, morality and to the other provisions contained in Part III (Article 25 (1)).

Those who would deny liberty of conscience cannot justify their action by condemning philosophical skepticism and indifference to religion, nor by appealing to social interests and affairs of state.

Our constitution guarantees an equal liberty of conscience limited only when such argument establishes a reasonably certain interference with the essentials of public order. Liberty is governed by the necessary conditions for liberty itself. Now by this elementary principle alone many grounds of intolerance accepted in past ages are mistaken. Thus, for example, Aquinas justified the death penalty for heretics on the ground that it is a far graver matter to corrupt the faith, which is the life of the soul than to counterfeit money which sustains life. So if it is just to put to death forgers and other criminals heretics may a fortiori be similarly dealt with. But the premises on which Aquinas relies cannot be established by modes of reasoning commonly recognized. It is a matter of dogma that faith is the life of the soul and that the suppression of heresy, that is, departures from ecclesiastical authority, is necessary for the safety of souls.<sup>3</sup>

#### 18.6. *Religious Tolerance.*

"Again, the reasons given for limited toleration often run a foul of this principle. Thus Rousseau thought that people would find it impossible to live in peace with those whom they regarded as damned, since to love them would be to hate God who punishes them. He believed that those who regard others as damned must either torment or convert them, and therefore sects preaching this conviction cannot be trusted to preserve civil peace. Rousseau would not, then, tolerate those religions which say that outside the church there is no salvation".

Locke can see nothing at all in his critic's arguments, and it must indeed be admitted that the position which the critics had chosen to defend was anything but strong—viz that in the case of those who will not embrace the true religion the magistrate ought to employ force in the shape of moderate penalties, to compel them to consider the error of their ways. Against this position Locke shows again and again that compulsion can produce only outward conformity not inward conviction that what was punished was really dissent.<sup>4</sup>

It is manifest that no chapter in human history has been so largely written in terms of prosecution and intolerance as the one dealing with religious freedom. From the ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dared to express or practice unorthodox religious beliefs. It is sometimes

1. W. Lillie : *An Introduction to Ethics*, p. 75.

2. Rawls—*A Theory of Justice*, p. 214-5.

3. Rawls—*A Theory of Justice*, p. 215.

4. *Encyclopedia of Religions and Ethics*, Vol. 8 p. 119 : Locke : *Letters for Toleration*.

stressed that such manifestations of intolerance by organised religious or beliefs were usually the result of traditions, practices and interpretations built up around them and often the followers of a religion or belief considered it to be the sole repository of truth and felt therefore that their duty was to combat other religions or beliefs <sup>1</sup>

How gratifying it is to notice that the traditions in our country were entirely different. Twenty-three centuries ago King Ashoka, patron of Buddhism, recommended to his subject that they should act in accordance with a principle of toleration which sounds as alive today as when it was propounded. Acting thus, we contribute to the progress of our creed by serving others. "Acting otherwise, we harm our own faith, bringing discredit upon the others. He who exalts his own belief, discrediting all others, does so surely to obey his religion with the intention of making a display of it But behaving this, he gives it the hardest blows."<sup>2</sup>

Toleration or encouragement of faiths other than the Rulers' own was the normal rule of the Hindu State. Ashok, though himself a believer in Buddha's teachings, shows great tolerance by requiring honour to be shown to all beliefs and sects in his 12th Rock Edict in the words: "Neither praising one's own sect nor blaming other sects should take place," that "other sects ought to be duly honoured in every case," that "concord (samavaya) alone is meritorious, that is they should both hear and honour each other's Dharma." In the 7th Pillar Edict (Delhi-Topra p. 136) Asoka proclaims that he has appointed officers called Mahamatras to look after the Sangha (the community or body of preaching Buddhist mendicants), Brahmanas, Ajivikas, Nigganthas and all other pasandas (sects).

Our Constitution has embodied the Indian tradition of toleration in Articles 25 and 26 of the Constitution <sup>3</sup>

Every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess practise and propagate his religion and everyone is guaranteed his freedom of conscience. The question naturally arises: Can an individual be compelled to have a particular belief on pain of a penalty, like ex-communication? One is entitled to believe or not to believe a particular tenet or to follow or not to follow a particular practice in matters of religion. No one can, therefore, be compelled, against his own judgment and belief to hold any particular creed or follow a set of religious practices. The Constitution has left every person free in the matter of his relation to his Creator, if he believes in one. It is, thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, imposed by the state in the interest of public order, etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the state or by any other person.<sup>4</sup>

### 18.7. *Ex-communication.*

Ex-communication, used as a measure of discipline for the maintenance of the integrity of the community in the ultimate analysis is, a binding-force which holds together a religious community and imparts to it a unity which makes it a denomination having a common faith, common belief in a common creed, doctrines and dogma. A community has a right to insist that those who claim

1. Jagadish Swarup, *Human Rights and Fundamental Freedoms*, p-321-2.

2. *Ibid.*

3. Kane : *History of Dharmasatra*, Vol. V Part 2 pp. 1011-1012.

4. *Saifuddin v. State of Bombay*, 1962 SC 853 (863).

to be within its fold are those who believe in the essentials of its creed and that who asserts that he is a member of the denomination does not, at least, openly denounce essentials of the creed for if every one were at liberty to deny those essentials the community as a group would soon cease to exist. It is in this sense that it is a matter of the very life of denomination that it exercises discipline over its members for the purpose of preserving unity of faith at least so far as the basic creed or doctrines are concerned. In *Saifuddin v. State of Bombay*,<sup>1</sup> the impugned enactment deprived the head of the denomination, of the power and the right to excommunicate and penalised the exercise of the power. It was held that the enactment rendered the head impotent to protect itself against dissidents and schismatics and was thus a violation of the right to practise religion guaranteed by Article 25 (1) of the Constitution.<sup>2</sup>

### 18.8. Propagate Tenets

The word 'Propagate' means 'to transmit or spread from person to person or from place to place; carry forward or onward ; diffuse ; extent; as to propagate a report; to propagate the tenets of a particular religion.'<sup>3</sup> It is in this sense that the word propagate has been used in the Articles 25 of the Constitution, for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's own religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees 'freedom of conscience' to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike.<sup>4</sup>

The meaning of this guarantee under Article 25 of the Constitution came up for consideration in the Supreme Court in *Ratilal Panachand Gandhi v. State of Bombay*,<sup>5</sup> and it was held as follows :—

"Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others"

In *Stainislaus v. State of Bombay*,<sup>6</sup> Ray, C. J. said". "The Supreme Court has given the correct meaning of the Articles, and we find no justification for the view that it grants a fundamental right to convert persons to one's own religion. It has to be appreciated that the freedom of religion enshrined in the Article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of person following the other religions. What is freedom for one, is freedom for the other, in equal measure and there can therefore, be no such thing as a fundamental right to convert any person to one's own religion."<sup>7</sup>

1. *Saifudin Saheb v. State of Bombay*, 1962 SC 853 (874).

2. *Ibid.*, p. 874, Sinha C. J. dissenting.

3. *Century Dictionary*, Vol. 6.

4. *Stainislaus v. State of M. P.*, 1977 SC 908 (911).

5. 1954 SCR 1055, 1954 SC 388.

6. 1977 SC 908 (911).

7. *Stainislaus v. State of M. P.*, 1977 SC 908 (911).

### 18.9. Mahant—Position of.

The ingredients of both office and property, of duties and personal interest are blended together in the rights of Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether. It is true that the beneficial interest which he enjoys is appurtenant to his duties and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public. But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the Math and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the mathadhipathi down to the level of a servant under the State department. It is from this standpoint that the reasonableness of the restrictions should be judged."<sup>1</sup>

Institutions, as such cannot practice or propagate religion ; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Article 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church, or monastery or in a temple or parlour meeting.<sup>2</sup>

In *Commr. Hindu Endowments v. Swamiar*,<sup>3</sup> the question was posed as to whether the word person in Article 25 of the Constitution meant individuals or corporate bodies as well, but was not decided.

A *Mathadhipati* is not a corporate body, he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practise and propagate the religious tenets, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person under Article 25.<sup>4</sup>

### 18.10. Limitation on the Freedom.

*Freedom of conscience and free profession, practice and propagation of religion.*—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.<sup>5</sup>

"In limiting liberty by reference to the common interest in public order and security", Rawls says "the government acts on a principle that would be chosen in the original position. For in this position each recognizes that the disruption of these conditions is a danger for the liberty of all. This follows once the maintenance of public order is understood as a necessary condition for everyone' achieving his ends whatever they are (provided they lie

1. *Digiyadarson R. R. Varu v. State of A P.*, 1970 SC 185.

2. *Commr. Hindu Religious Edowments v. Swamiar*, 1954 SC 282 (289).

3. *Ibid.* p. (289).

4. *Ibid.*, p. (289).

5. *Constitution of India*, Art. 25 (1).

within certain limits) and for his fulfilling his interpretation of his moral and religious obligations.

The government's right to maintain public order and security is an enabling right, a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them." Further more, liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order which the government should maintain."<sup>1</sup>

#### 18.11. *Public Order.*

The two Articles 25 and 26 in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order.

"Public order" is an expression of wide connotation and signifies state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established."

In *Ramjilal Mo-li v. State of U. P.*<sup>2</sup> the Supreme Court held that "it could not be predicated that freedom of religion could have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion could not under any circumstances be said to have been enacted in the interests of public order".

#### 18.12. *Morality.*

Morality is either wholly or almost wholly concerned with relations between men, with how they ought to behave toward each other, with what general rules governing relations between man and man a surely ought to adopt. In Hobbes's words, 'the province of morality is limited "those qualities of mankind that concern their living together in peace and unity." Moral duties are the duties which arise under such a system of rules.

Though these systems differ widely in detail, their need to preserve social harmony ensure a broad similarity in fundamentals. All moral codes condemn aggression in justice and deceit at least within the social group<sup>3</sup>

#### 18.13. *State's right to interfere in Religious practice.*

Only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion.

This does not mean that the right to participate in religious exercises is absolute or that the State may never prohibit or regulate religious practices. The Court have recognised that even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions.<sup>4</sup>

The limits of permissible Governmental action with respect to religion must reflect an appropriate accommodation of an heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Constitution.

1. Rawls---*A Theory of Justice*, p. 212-3.

2. (1957) SCR 260 : 1957 SC 620.

3. *Encyclopedia of Philosophy*, Columns 7 and 8 p. 150-51.

4. *Sherbert v. Verner*, 10 Led. 2d. 965.

Fundamental to the conception of religious liberty is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations and that each section is entitled to flourish according to the zeal of its adherents and the appeal gets dogma.

At all periods of human history there have been religions which have involved practices which have been regarded by large numbers of the people as essentially evil and wicked. Many religions involve the idea of sacrifice, and the practice of sacrifice has assumed the form of human sacrifice or animal sacrifice as appears in the Old Testament, and in many other sacred writings and traditions. So also religions have differed in their treatment of polygamy. Polygamy was not reprobated in the Old Testament; it has been part of the Mormon religion; it is still an element in the religion of millions of Mohammedans, Hindus, and other races in Asia.<sup>1</sup>

In *George Reynolds v. United States*,<sup>2</sup> a Mormon who had a religious belief in polygamy, and who had more than one wife, was indicted for polygamy. It was held that his religious belief could not be accepted as a justification for the commission of an overt act which was made criminal by the law of the land. White, C. J., who announced the unanimous decision of the Court upon the relevant question, referred to the history of legislation in favour of or directed against particular religions, and to the fact that polygamy had generally been a crime among the northern and western nations of Europe. He said:—"Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice. Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances". Upon this reasoning the Court refused to set aside a conviction for bigamy.<sup>3</sup>

Though a person's religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleases in exercise of his religious beliefs. He has been guaranteed the right to practice and propagate his religion subject to the limitations mentioned in Article 25. His right to practice his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the Legislature has declared to be of a penal character. Laws made by a competent legislature, in the interest of public order and the like, restricting religious practices, would come within the regulating power of the State. For example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. It must therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those

1. *Adelaide Co. of Jehovah's Witness Incorp. v. The Commonwealth*, (1943) 67 CLR 116 (125).

2. 25 L ed. 244.

3. 67 CLR 116 (129).

beliefs may be liable to restrictions in the interest of the community at large, as may be determined by common consent. It was on such humanitarian grounds and for the purpose of social reform that so called religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a god to function as a devadasi, or of ostracising a person from all social contacts and religious communion on account of his having eaten food or taboo, were stopped by legislation.<sup>1</sup>

#### 18.14. Religion—What is means.

Articles 25 and 26 of the Constitution together safeguard the rights of the citizen to freedom of religion.

It would be difficult, if not impossible to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. What is religion to one is superstition to another.<sup>2</sup> Some religions are regarded as morally evil by adherents of other creeds.<sup>3</sup>

The scope of religion has varied very greatly during human history. Probably most Europeans would regard religion as necessarily involving some ideas or doctrines affecting the relation of man to a Supreme Being. But Buddhism, one of the great religions of the world, is considered by many authorities to involve no conception of a God. For example, Professor Gilbert Murray says : "We must always remember that one of the chief religions of the world, Buddhism, has risen to great moral and intellectual heights without using the conception of God at all ; in his stead it has Dharma, the Eternal Law". On the other hand, almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the every day life of the individual—all of these may become part of religion. Once upon a time all the operations of agriculture were controlled by religious precepts. Indeed, it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character.<sup>4</sup>

The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. At least through the nineteenth century in the United States religion was referred to theistic notions respecting divinity morality and worship and was recognised as legitimate and protected only so far as it was generally accepted as civilised by western standards.<sup>5</sup> In an American case,<sup>6</sup> it was said :

1. *Saijuddin v. State of Bombay*, 1962 SC 853 (863).

2. *Adelaide Co. of Jehovah's Witness Incorp. v. The Commonwealth*, 67 CLR p. 116 (124).

3. *Adelaide Co. of Jehovah's Witness Incorp. v. The Commonwealth*, 67 CLR 166 (123), Latham L. J.

4. *Ibid.*, 124.

5. Tribe : *American Constitutional Law*, p. 825.

6. *Davis v. Beason*, (1888) 133 US 333 (342) ; quoted in 1954 SC 282 (290).

“that the term ‘religion has reference to one’s view of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with ‘cultus’ of form or worship of a particular sect, but is distinguishable from the latter.”

“We do not think” said Mukherjea, J. “that the above definition in *Davis v. Beason*, (1888) 133 US 333 (342) case could be regarded as either precise or adequate”.

But even before the term of the century dramatic changes were surfacing in American religion. Religion in America, always pluralistic has become radically so in the latter part of the century.

Even within a single religion—Christianity—tremendous diversity has occurred with some Christian group formerly accepting members who regard the concept of God as irrelevant or even harmful.

The changed circumstances made it all but inevitable that the Supreme Court would modify the narrow understanding of ‘religion’ that had characterized the early development of this area of the law. Clearly, the notion of religion in the free exercise clause must be expanded beyond the closely bounded limits of theism to account for the multiplying forms of recognizably legitimate religious exercise.<sup>1</sup>

Consider, for example, the curious law suit in *Malnak v. Maharishi Mahesh Yogi*<sup>2</sup> where plaintiffs contend that the New Jersey School system is violating the establishment clause by allowing licenced teachers to use public school facilities to teach Transcendental Meditation (TM) as an elective course. The T. M. course trains students in a method or process of meditation. For some, it is a religion; but for thousands of people throughout the country it is a mental exercise, often engaged in by enthusiastic adherents of such formal religions as Christianity, Judaism and Mohammedanism. Clearly TM should be deemed a religion for purposes of the free exercise clause; if the government sought to forbid it as an activity, the free exercise clause would stand in the way. But if the same definition of religion were adopted for the establishment clause, offering the course proposed in *Malnak* would be unconstitutional even though many plausibly regard it as no more ‘religious’ than courses in methods of concentration or body control. Are the teaching of psychology or of self-hypnosis forbidden by the establishment clause.<sup>3</sup>

Religion is a matter of faith with individuals and communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress”.

1. Tribe : *American Constitutional Law*, p. 826.

2. File No. 76-341 US District Court : Tribe : *American Constitutional Law*, p. 828.

3. Tribe : *American Constitutional Law*, p. 828.

4. *Commissioner Hindu Religious Endowment v. Swamiar*, 1954 SC 282 (290); *Acharya Jagadishwaranand v. Commr. of Police*, (1983) 4 SCC 522 (531).



Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had crept into it a sect was born which was governed by its own tenets but which basically subscribed to the fundamental notions of Hindu religion and Hindu Philosophy. In *Sastri Yagnapurushdasji v. Muldas Bhundardas*<sup>1</sup> the question for consideration was whether the followers of Swami Narain belonged to a religion different from that of Hinduism. It was held that it was not a different religion. In *Acharya Jagdish v. Commissioner of Police*,<sup>2</sup> the Supreme Court relying on the test indicated by the Chief Justice held that Anand Marg belonged to Hindu religion.

In *Venkataramana Devaru v. State of Mysore*<sup>3</sup> Venkatarama Aiyar, J. observed that the matters of religion in Art. 26 (b) include even practices which are regarded by the community as part of its religion.

It would thus be clear that religious practice to which Art. 25 (1) refers and affairs in matters of religion to which Art. 26 (b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Article 25 (1) and Art. 26 (b) extends to such practices.<sup>4</sup>

### 18.15. Practice of Religion.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of religion and this is made clear by the use of the expression "practice of religion" in Article 25.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Art. 25. Latham, C. J. of the High Court of Australia while dealing with the provision of Section 116, Australian Constitution which '*inter alia*' forbids the Commonwealth to prohibit the 'free exercise of any religion' made the following weighty observations<sup>5</sup> :—

"It is sometimes suggested in discussion on the subject of freedom of religion that, though the civil government should not interfere with religious 'opinions' it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of Section 116. The section refers in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any Commonwealth

1. 1966 S.C.1119, per Gajendragadkar., C.J.

2. (1983) 4 SCC 520 (529).

3. *Venkataramana Devaru v. State of Mysore*, 1958 SC 255 (264) quoted in 1963 SC 1660.

4. *Commissioner, Hindu Religious Endowments Madras v. 'Swamiar'* 1954 SCR 1005 : 1954 SS 282.

5. *Adelaide Company of Jehovah's Witness Incor v. The Commonwealth*, 67 CLR 116 (127) (H) : quoted in *C.H.R. Endowments v. L. T. Swamiar*, 1954 SC 282 (290).

laws acts which are done in the exercise of religious. Thus the Section goes for beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices.

### 18.16. Management of Property—Religious denomination.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(b) to manage its own affairs in matters of religion ;

No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.<sup>1</sup>

Now what is the precise meaning or connotation of the expression "religious denomination ?

The word denomination has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name ; a religious sect or body having a common faith and organisation and designated by a distinctive name."<sup>2</sup>

This test was followed in *Durgah Committee, Ajmer v. Syed Husain Ali*<sup>3</sup> In the majority judgment in *S. P. Mittal v. Union of India*<sup>4</sup> reference to this aspect had been made and it was stated that the words religious denomination in Article 26 of the Constitution must take their colour from the word 'religion' and if this is so the expression religious denomination must satisfy three conditions ; (1) it must be a collection of individuals who has a system of belief or doctrines which they regard as conducive to their spiritual well being, that is, a common faith; (2) common organisation and (3) designation by a distinctive name. Anand Marg appears to satisfy all the three conditions and can be appropriately treated as a religious denomination within the Hindu religion.<sup>5</sup>

The practice of setting up Maths as centres of theological teaching was started by Shankaracharya and was followed by various teachers since then. After Shankara, came a galaxy of religious teachers and philosophers, who founded the different sects and sub-sects of the Hindu religion that we find in India in the present day. "Each one of such sects or sub-sects," said Mukherjee, J. "can certainly be called a religious denomination, as it is designated by

1. Constitution of India Art. 27.

2. 1954 SC 282 (289).

3. (1962) 2 SCR 389 : 1961 SC 1402 (1425).

4.. (1983) 1 SCR 729 (775).

5. *Acharya Jagadishwara Nand v. Commr. of Police*, (1983) 4 SCC 522 (530).

a distinctive name, in many cases it is the name of the founder and has a common faith and common spiritual organization. The followers of Ramanuja who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination ; and so do the followers of Madhawacharya and other religious teachers." As Art. 26 contemplates not merely a religious denomination but also a section thereof, the math or the spiritual fraternity represented by it can legitimately come within the purview of this Article 26 (4).<sup>1</sup>

### 18.17. *Essential Part of Religion.*

What constitutes the essential part of religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or; that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests or servants or the use of marketable commodities would not make their secular activities partaking of a commercial or economic character, all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26 (b)<sup>2</sup>. The expression "matters of religion" thus embraces not merely matters of doctrine and belief pertaining to the religion but also the practice of it, or to put it in terms of Hindu theology, not merely its Gnana, but also its Bhakti and Karma Kand also.<sup>3</sup> In the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decisions in such matters.<sup>4</sup>

Freedom of religion in our Constitution is not confined to religious beliefs only ; it extends to religious practices as well subject to the restrictions which the Constitution has laid down. A religious denomination or organization enjoys complete autonomy.

Religious practices to which Art. 25 (1) refers and "affairs of matters of religion to which Art. 26 (b) refers, include practices which are an integral part of the religion itself. The question as to whether a given religions practice is an integral part of religion or not will always have to be decided by the Court on the evidence before it as to the conscience of the community and the tenets of its religion. In order that the practices in question should be treated as a part religion, they must be regarded by the said religion as its essential and integral part ; otherwise even secular practices which are not an essential or integral part religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26.<sup>5</sup>

It being thus settled that matters of religion in Art. 26 (b) include even practices which are regarded by the community as part of its religion, the Supreme Court had to consider in *Vekata ramana Devaru v. State of Mysore*,<sup>6</sup>

1. *Commr. Hindu Religious Endowments v. Swamiar*, 1954 SC 282 (289).

2. *Commissioner Hindu Religious Endowment v. Sri Lakshmendra Jhutha Swamiar*, 1954 SCR 1005 : 1954 SC 282 (290-291).

3. *Venkataramana Devaru v. State of Mysore*, 1958 SC 255 (264).

4. *Commr. of Hindu Religious Endowments v. Swamiar*, 1954 SC 282 (291).

5. *Shri Govindlalji v. State of Rajasthan* v. 1963 SC 1638 (1660) ; *E.R.J. Swami v. State of Tamil Nadu*, 1972 SC 1586 (1593); *Sardir Syedna Tahir Sarfuddin v. State of Bombay*, (1962) Supp. 2 SCR 496 : 1962 SC 853.

6. 1958 SC 255 (265).

whether exclusion of a person from entering into a temple for worship was matter of religion according to Hindu ceremonial Law. The Supreme Court answered it in the affirmative. Venkatarama Aiyer, J. said: "Under the ceremonial law pertaining to temples, who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion." This answer raised the further question whether the right guaranteed under Art. 26 (b) was subject to a law protected by Art. 25 (b) throwing open the temples open to all classes and sections of Hindus. In *Venkataramana Devaru v. State of Mysore*.<sup>1</sup> the contention was that construing Art. 25 (b) in the light of Art 17, its object was only to permit entry to the excluded classes into temples which were open to all other classes of Hindus and that would exclude its application to denominational temples, which *ex hypothesi* were founded for the benefit of particular sections of Hindus. Venkatarama Aiyer, J. speaking for the Court said: "It is impossible to read any such limitation into the language of Art 25 (2) (b). It applies in terms to all religious institutions of a public character without qualification or reserve. Public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein". A law which fall within Article 25 (2) (b) will control the right conferred by Article 25 (1) and the limitation in Article 25 (1) does not apply to the law.

The right protected by Article 25 (2) (b) is a right to enter into a temple for purposes of worship, and this right is to be construed liberally in favour of the public, but it does not follow from this that that right is absolute and unlimited in character. No member of the Hindu public, could for example claim as part of the rights protected by Article 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform these services, which the Acharkas alone could perform. "It is again", said Venkatarama Aiyer, J. "a well known practice of religious institutions of all denominations to limit some of its services to persons who have been specially initiated though at other times, the public in general are free to participate in the worship. Thus the right recognised by Article 25 (2) (b) must necessarily be subject to some limitation or regulations and one such limitation or regulations must arise in the process of harmonising the rights conferred by Article 25 (2)(b) with that protected by Article 26 (b)."<sup>2</sup>

Where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination then the question is not whether Article 25 (2) (b) overrides that right so as to extinguish it but whether it is possible, so to regulate the rights of the persons protected by Article 25 (2) (b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Article 25 (2) (b), then of course the denominational rights must vanish. But where that is not the position and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why Article 25 (2) should not be so construed as to give effect to Article 26 (b) and recognise the rights of the denomination in respect of matters which are strictly denominational leaving the rights of the public in other respects unaffected.<sup>3</sup> On the facts of this case

1 1958 SC 255 (267).

2. *Ibid.*, p. 268.

3. *Ibid.*, p. 269.

the Supreme Court thought that it was possible to protest the rights of the appellants on certain special occasions without affecting the substance of the right declared by Article 25 (2) (b).

It is impossible to read any limitation into the language of Article 25 (2) (b). It applies in terms to all religious institution of a public character without qualification or reserve. Public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to read into it, limitations which are not there based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute ; and in a Court of law, what is unexpressed has the same value as what is unintended. The court therefore held that denominational institutions are within Article 25 (2) (b)."<sup>1</sup>

It has been distinctly held that Article 26 (b) must be read subject to Article 25 (2) (b) of the Constitution.

On the social aspect of ex-communication, one is inclined to think that the position of an ex-communicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Article 17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden. The Articles further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.<sup>2</sup>

### 18.18. Integral part of Religion

In *Acharya Jagdishwaranand Avadhuta v. Commr. of Police*,<sup>3</sup> the question for consideration was whether performance of Tandava dance was a religious rite or practice essential to the tenets of the religious faith of the Anand Marg. Even conceding that Tandava dance had been prescribed as a religious rite for every followers of the Anand Marg the Supreme Court held that it did not follow as a necessary corollary that Tandava dance to be performed in the public was matter of religious rite. The contention that performance of Tandava dance in a procession or at public places was an essential religious rite to be performed by every Anand Marga was not accepted.

What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character ; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26 (b).

1 *Saifuddin Saheb v. State of Bombay*, 1962 SC 853 (866).

2. *Ibid.*

3. (1983) 4 SCC 522.

4. *Ibid.*

Courts have the power to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion. In *Commrs. Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar*,<sup>1</sup> case, Mukherjea, J. observed :

“This difference in judicial opinion brings out forcibly the difficult task which a court has to perform in cases of this type where the freedom of religious convictions genuinely entertained by men come into conflict with the proper political attitude which is expected from citizens in matters of unity and solidarity of the State organisation”.

The same question arose in the case of *Ratilal Panachand Gandhi v. State of Bombay*.<sup>2</sup> The Court did go into the question whether certain matters appertained to religion and concluded by saying that “these are certainly not matters of religion and the objection raised with regard to the validity of these provisions seems to be altogether baseless. In *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*,<sup>3</sup> the Court went into the question as to whether the tenets of the Vallabh denomination and its religious practices require that the worship by the devotees should be performed at the private temples and, therefore, the existence of public temples was inconsistent with the said tenets and practices, and on an examination of this question, negatived the plea.

In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites while dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and tenets of its religion.<sup>4</sup> It is in the light of this possible complication which may arise in some cases that the Supreme Court struck a note of caution in the case of *Durgah Committee Ajmer v. Syed Hussain Ali*,<sup>5</sup> and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26.<sup>6</sup>

1. 1954 SC 284 : 1954 SCR 1005.

2. 1954 SC 388 : 1954 SCR 1055.

3. 1963 SC 1638.

4. 1963 SC 1660.

5. 1961 SC 1402 (1415).

6. *Sri Govindlalji v. State of Rajasthan*, 1963 SC 1638 (1660).

In this connection, it cannot be ignored that what is protected under Articles 25 (1) and 26 (b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character it cannot be urged that Article 25 (1) or Article 26 (b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practice religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matter of religion, then of course, the right guaranteed by Article 25 (1) and Article 26 (b) cannot be contravened.<sup>1</sup>

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affairs in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Articles 25 (1) and 26 (b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Article 25 (1) and Article 26 (b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Article 25 (1) or Article 26 (b). This aspect of the matter must be borne in mind in dealing with true scope and effect of Articles 25 (1) and Article 26 (b).<sup>2</sup>

#### 18.19. *Section 144 of Code of Criminal Procedure.*

The power conferred under Section 144 is intended for immediate prevention of breach of peace or speedy remedy. An order made under this section is to remain valid for two months from the date of its making as provided in sub-section (4) of section 144. The proviso to sub-section (4)

1. *Shri Govindlalji v. State of Rajasthan*, 1963 SC 1638 (1960).

2. *Ibid.*

authorises the State Government in case it considers it necessary to do so for preventing danger to human life, health or safety, or for preventing a riot or any affray, to direct by notification that an order made by a Magistrate may remain in force for a further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired. The effect of the proviso, therefore, is that the State Government would be entitled to give the prohibitory order an additional term of life but that would be limited to six months beyond the two months period in terms of sub-section (4) of Section 144 of the Code.

The proviso to sub-section (4) of Section 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order under Section 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders.

If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Code. It is relevant to advert to the decision of this Court in *Babulal Parate v State of Maharashtra*,<sup>1</sup> where the vires of Section 144 of the Code was challenged. Upholding the provision, the Supreme Court observed :

“Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order.”

But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order.

The Supreme Court had, therefore, appropriately stressed upon the feature that the provision of Section 144 of the Code was intended to meet an emergency. This postulates a situation temporary in character and, therefore, the duration of an order under Section 144 of the Code could never have been intended to be semi-permanent in character.



## Freedom to manage religious affairs

### SYNOPSIS

- 19.1. Article 26 (b).
- 19.2. Religious Practice.
- 19.3. Article 26 (b) and 26 (d)---Power to acquire and manage property.
- 19.4. Management by religious denomination.
- 19.5. Freedom to manage property.

#### 19.1. Article 26 (b).

“26. *Freedom to manage religious affairs.*—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(b) to manage its own affairs in matter of religion.”<sup>1</sup>

It should be noted that the complete autonomy which a religious denomination enjoys under Article 26 (b) is in “matters of religion” which has been interpreted as including rites and ceremonies which are essential according to the tenets of the religion. Now, Article 26 (b) itself would seem to indicate that a religious denomination has to deal not only with matters of religion, but other matters connected with religion, like laying down rules and regulations for the conduct of its members and the penalties attached to infringement of those rules, managing property owned and possessed by the religious community, etc. A line of demarcation has to be drawn between practices consisting of rites and ceremonies connected with the particular kind of worship which is the tenet of the religious community and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion.<sup>1</sup> In this connection, the following observation of the Supreme Court in *Durgah Committee, Ajmer v. Hussain Ali*<sup>2</sup> which

1. *Constitution of India*, Art. 26 (b).

2. 1961 SC 1402.

were made with reference to the earlier decisions of that Court in *Sri Venkataraman Devasu v. State of Mysore*,<sup>1</sup> that "matters of religion" in Article 26 (b) include even practices which are regarded by the community as part of its religion, may be noted.

### 19.2. Religious Practice.

"Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part ; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices through religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised ; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."<sup>2</sup>

### 19.3. Article 26 (b) and 26 (d)—Power to acquire and manage property.

26. *Freedom to manage religious affairs.*—Subject to public order, morality and health, every religious denomination or any section thereof has the right—

(c) to own acquire movable and immovable property ; and

(d) to administer of such property in accordance with law.

The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose.<sup>3</sup>

The language of the two clauses (b) and (d) of Article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of the management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust property by means of laws validly enacted ; but here again it should be remembered that under Article 26 (d), it is the religious denomination itself which has been given the right to administer its property in accordance with law. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Article 26 (d) of the Constitution.<sup>4</sup>

### 19.4. Management by religious denominations.

The right guaranteed under Article 26 (b) is subject to the law protected by Article 25 (2) (b). In *Mulki Temple case*<sup>5</sup> the question before the Supreme

1. 1958 SC 255: *Saifuddin Saheb v. State of Bombay*, 1962 SC 853 (864).

2. *Ibid* ; *Durgah Committee, Ajmer v. Hussain Ali*, 1961 SC 1402.

3. *Commr. Religious Endowments v. Lakshmindra Swamiar*, 1954 SC 282 (289-90).

4. *Ibid*.

5. *Sri Venkataramana Devaru v. State of Mysore*, 1958 SCR 895 : 1958 SC 255.

Court related to the validity of the law which threw open all public temples, even those belonging to a religious denomination to every community of Hindus including "untouchables" and it was held that notwithstanding that the exclusion of those from worship in such a temple was an essential part of the "practice of religion" of the denomination, the constitutionality of the law was saved by the second part of Article 25 (2) (b) reading "the throwing open of Hindu religious institutions of a public character to all classes and sections."

The above decision proceeded on two basis viz. (1). As regards the position of untouchables, Articles 17 of the Constitution had made express provision stating "untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence and that had to be recognised as a limitation on the rights of religious denominations however basic and essential the practice of the exclusion of untouchables might be in the tenets or creed. Secondly there was a special saving as regards laws providing for throwing open of public Hindu religious institutions to all classes and sections of Hindus in Articles 25 (2) (b), and effect had to be given to the wide language in which the provision was couched. In the face of the language used, no distinction could be drawn between beliefs that were basic to a religion or religious practices that were considered to be essential by a religious suit, on the one hand and on the other belief and practices that did not form the core of a religion or of the practices of that religion. The phraseology employed cut across and effaced these distinctions.<sup>1</sup>

#### 19.5. Freedom to manage property.

Freedoms to own and acquire movable and immovable property ; and to administer such property in accordance with law, guaranteed by Article 26 do not create rights in any denomination or its section which it never had ; they merely safeguard and guarantee the continuance of rights with such denomination or its section had. In other words, if the denomination never had the right to manage the properties endowed in favour of denominational institution as for instance by reason of the terms on which the endowment was created it cannot be heard to say that it has acquired the said rights as a result of Articles 26 (c) and (d) and that the practice and custom prevailing in that behalf which obviously was consistent with the term of the endowment should be ignored or treated as invalid and the administration and management should be given to the denomination. Such a claim will be plainly inconsistent with the provisions of Article 26. If the right to administer the properties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it Article 26 can not be successfully invoked.<sup>2</sup>

In *State of Rajasthan v. Sajjan Lal*<sup>3</sup> it was found that the constitutions under which the properties and management of the temple had vested in the Ruler and thereafter in the State continued to be the law by virtue of Article 372 of the Constitution till it was repealed by impugned Act. Since the respondents lost the right to manage and administer the temple and its properties prior to the Constitution by a valid law, they could not as the Supreme Court held, regain that right on the plea that law contravened the right granted under Article 26 (d).

1. *Venkataramana Devaru v. State of Mysore*, 1958 SC 255 : 1962 SC 853 (875)

2. *Durgah Committee, Ajmer v. Hussain Ali*, (1962) 1 SCR 383 (414); 1961 SC 1402 (1416) ; *State of Rajasthan v. Sajjan Lal*, 1975 SC 706 (715).

3. 1975 SC 706 (715).:-

Administration of the 'denomination property' which is the subject-matter of clause 26 (d) is obviously outside the scope of Article 26 (b). Matters relating to the administration of the denomination's property fall to be governed by Article 26 (d) and cannot attract the provisions of Article 26 (b). Article 26 (b) relates to affairs in matters of religion such as the performance of the religious right or ceremonies or the observance of religious festivals and the like; it does not refer to the administration of the property at all. Article 26 (d) therefore, justifies the enactment of a law to regulate the administration of the denomination's property and that is precisely what the Article has purported to do in the *Sri Govindlalji's* case. If the clause 'affairs in matters of religion'<sup>2</sup> were to include affairs in regard to all matters, whether religious or not, the provisions under Article 26 (d) for legislative regulation of the administration of the denomination's property would be rendered illusory.<sup>1</sup>

Article 26 (d) recognises the denomination's right to administer its property, but it clearly provides that the said right to administer the property must be in accordance with law. Subject to public order, morality every religious or a section thereof has the right to own, acquire movable and immovable property and to administer such property in accordance with law.<sup>2</sup>

In *Shri Govindlalji's* case (supra) it was contended that the 'law' in the context was the law prescribed by the religious tenets of the denomination and not a legislature enactment. But the Supreme Court rejected the contention. It held that the 'law' meant a law passed by a competent legislature. The clause (d) emphatically brought out the competence of the legislature to make a law in regard to the administration of the property belonging to the denomination. It is true that under the guise of regulating the administration of the property by the denomination, the denomination's right must not be extinguished or altogether destroyed. That is what the Supreme Court held in the case of the *Commissioner, Hindu Religious Endowments Madras*.<sup>3</sup>

In considering the scope of Art. 26 one has to bear in mind two basic postulates: First that a religious denomination is possessed of property which under Art. 26 (d) the religious denomination has the right to administer. From this it would follow that subject to any law grounded on public order, morality or health the limitations with which Art. 27 opens, the denomination has a right to have the property used for the purposes for which it was dedicated.

Article 26 (d) speaks of the administration of the property being in accordance with law and it was argued that a valid law could be enacted which would permit the diversion of those funds to purposes which the legislature in its wisdom thought it fit to appropriate. But the Court did not accept this argument.

A law which provides for or permits the diversion of the property being in the use of persons, who have been excluded from the denomination would not be 'a law' contemplated by Art. 26 (d). In *Saifuddin's* case<sup>4</sup> it was held that if a law permitted or enjoined the use of the property belonging to the denomination by an apostate it would be a wholly unauthorised diversion which would be a violation of Articles 26 (d) and also of Article 26 (e) not to speak of Art. 25 (1).

1. *Shri Govind Lal Ji v. State of Rajasthan*, 1963 SC 1683 (1662).

2. *Ibid.*, p. 1662.

3. 1954 SCR 1005 ; 1954 SC 212 ; *Ratilal Panachand Gandhi v. State of Bombay*, 1954 SCR 1055 ; 1954 SC 388 ; *Shiv Govindlalji v. State of Rajasthan*, 1963 SC 1684 (1662).

4. *Saifuddin Saheb v. State of Bombay*, 1962 SC 853 (873).

In *Sri Govindlalji v. State of Rajasthan*<sup>1</sup> the only right which according to the denomination, had been contravened was the right of the Tilkayat to manage the property belonging to the temple. It was urged that throughout the history of that temple, its properties had been managed by the Tilkayat and so, such management by the Tilkayat amount to a religious practice under Article 25 (1) and constituted the denomination's right to manage the affairs of its religion under Article 26 (b). The Supreme Court in rejecting the argument said: The right to manage the properties of the temple is a purely secular matter and it cannot, be regarded as a religious practice so as to fall under Article 25 (1) or as amounting to affairs in matters of religion. It is true that the Tilkayats had been respected by the followers of the denomination and it was also true that the management had remained with the Tilkayats, except on occasions like the minority of the Tilkayat when the Court of Wards stepped in. If the temple had been private and the properties of the temple had belonged to the Tilkayat, it was another matter. But once it is held that the temple is a public temple, it is difficult to accede to the argument that the tenets of the Vallibha cult require as matter of religion that the properties must be managed by the Tilkayat. In fact, no such tenet has been adduced before us. So long as the denomination believed that the property belonged to the Tilkayat like the temple, there was no occasion to consider whether the management of the property should be in the hands of anybody else. The course of conduct of the denomination and the Tilkayat based on that belief may have spread for many years, but, in our opinion, such a course of conduct cannot be regarded as giving rise to a religious practice under Art. 25 (1). A distinction must always be made between a practice which is religious and a practice in regard to a matter which is purely secular and has no element of religion associated with it. Therefore, we are satisfied that the claim made by the denomination that the Act impinges on the rights guaranteed to it by Articles 25 (1) and 26 (b) must be rejected."<sup>2</sup>

In *State of Rajasthan v. Sajjan Lal*<sup>3</sup> what the Court had to decide was whether the provisions of sub-section (1) read with sub-section (4) & (5) of Section 53 of the Rajasthan Public Trust Act, 1959 authorised the vesting of the administration in a committee of management which did not represent the religious denomination and which was entitled to manage & administer that religious trust. The committee of management that the State Government was empowered to constitute had to be from amongst the two categories in sub-section (5) in accordance with the general wishes of the persons so interested so far as such wishes could be ascertained in the prescribed manner. This provision according to the Supreme Court, furnished a safeguard against the appointment of the chairman and the members of the committee to manage the trust who did not subscribe or adhere to the tenets of a particular religion or denomination to which the trust belongs. No such appointment can be made which contravenes the fundamental rights guaranteed under Article 25 and 26 of the Constitution and if any such appointment is made, those who have a right to challenge it can do so and have the appointment struck down.

In *Durgah Committee, Ajmer v. Syed Hussain Ali*,<sup>4</sup> the Supreme Court observed while dealing with Article 26 (a) and (d) of the Constitution that even if it be assumed that a certain religious institution was established by a minority it may lose the right to administer it in certain circumstances. We may in

1. 1963 SC 1638 (1624).

2. *Ibid.*, p. 1662.

3. 1975 SC 706 (723-4).

4. (1962) 1 SCR 383 (414); 1961 SC 1402 (1416); *Azeez Basha v. Union of India*, 1968 SC 669.

this connection refer to the following observation for they apply equally to Article 30 (1).

If the right to administer the properties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked.<sup>1</sup>

In the right to manage its properties is included the right to spend the trust property or its income for the religious purposes. To divert the trust funds for purposes which the charity commissioner or the Court consider expedient or proper would be an unwarranted encroachment on the freedom of religious institutions in regard to the management of their religious affairs.<sup>2</sup>

The distinction between matters of religion and those of secular administration may at times appear to be thin one. But in cases of doubt, the Court should take a common sense view and be actuated by considerations of practical necessity.<sup>3</sup>

The scale of expenses to be incurred in connection with the religious observance would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authority in accordance with any law laid down by a competent legislature. If the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution proper control can certainly be exercised by State agencies as the law may provides.<sup>4</sup>

The object of a Math is to maintain a competent line of religious teachers for propagating and strengthening the religious doctrines of a particular order or sect and as there could be no Math without a Mathadhipati as its spiritual head. In *Ratilal v. State of Bombay* (supra) it was held by the Supreme Court that Section 44 of the Bombay Public Trusts Act, 1956 relating to the appointment of the Charity Commissioner as a trustee without any reservation in regard to the religious institutions like temples and Maths was unconstitutional and void.

1. *Durgah Committee, Ajmer v. Syed Hussain*, 1961 SC 1402 (1416) ; *Azeez Basha v. Union of India*, 1968 SC 662 (670).

2. *Rati Lal v. State of Bombay*, 1954 SC 318 (399).

3. *Ibid.*, p. 392.

## Freedom as to payment of taxes for promotion of any particular religion

### SYNOPSIS

#### 20.1 Article 27.

#### 20.1. Article 27.

Article 27 deals with freedom as to payment of taxes for promotion of any particular religion—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.<sup>1</sup>

In *Mahant Moti Das v. Sahi*<sup>2</sup> the validity of section 70 (1) of the Bihar Hindu Religion Trust as Act, 1951 was challenged. The Supreme Court following the decision in the earlier case held that the imposition was a fee and that it was valid.

Article 27 prohibits specific appropriation of the proceeds of any tax for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is obvious this being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups. It will be against the policy of the Constitution to pay out of public funds any money for the promotion of any particular religion or religious denominations.<sup>3</sup>

1. *Constitution of India*, Art. 27.

2. 1959 SC 942.

3. *Commr. of Hindu Religious Endowments v. Lakshmidra Thirtha Swaminar*, 1954 SC 282 (296); *Jagannath Ramanuj Das v. State of Orissa*, 1954 SC 400; *Mahant Motidas v. S. P. Sahi*, 1959 SC 942.

In the well-known *Shirur Mutt* case,<sup>1</sup> the validity of Section 76 of Madras Hindu Religious and Charitable Endowments Act, 1951 was questioned as it provided for levy of a contribution of Maths and public temples. The levy of this contribution was objected on the ground that it offended Article 27 of the Constitution. Dealing with this part of the case, the Supreme Court said : "But the object of the contribution under section 27 of the Madras Act is not the fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered. It is a secular administration of the religious institutions that the legislature seeks control and the object, as enunciated in the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for the purposes for the which they were founded or exist. There is no question of favouring any particular religion, or religious denomination in such cases. In our opinion, Art. 27 of the Constitution is not attracted to the facts of the present case."

The same view was reiterated by the Supreme Court in the subsequent decision in *Sri Jagannath v. State of Orissa*.<sup>2</sup> In *K. Raghunath v. State of Kerala*,<sup>3</sup> the facts were that on 28th December, 1971, there were some unfortunate incidents at Tellicherry and the surrounding villages between two sections of the people, Hindus and Muslims. As a result some shops, buildings and places of worship of both the sections were destroyed. The Government started relief measures and a sum of Rs. 25,009 was sanctioned from the Distress Relief Funds for distribution of adhoc grants to those who were rendered homeless and to those whose houses were damaged. Government passed an order to the following effect : Government orders that the cost of repairs or reconstruction for the restoration to the condition existing prior to the incidents of religious and educational institutions and the houses of serving defence personnel damaged will be met by the Government." The order was held to be valid. Fund constituted out of taxes collected by the Government and even if a "specific appropriation therefrom was possible, still there was the further question whether there was any promotion or maintenance of a particular religion or religious denomination in this case. Houses, schools and places of worship belonging to both religious groups, Hindus and Muslims, were damaged, and in restoring them to their original condition, there was no question of promotion or maintenance of any particular religion or religious denomination. Building of both sections are repaired and restored. It is not because the buildings belonged to a particular religious denomination that they were restored, but because they were damaged in the incidents. Even otherwise, if place of worship belonging to one religious denomination alone were damaged and they alone were to be reconstructed, even then, there was no question of promotion or maintenance of that particular religion or religious denomination."<sup>4</sup>

Article 27 of the Constitution enjoins that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Contributions as a kind of fee for better management of the wakf property, cannot be treated as tax as contemplated in Art. 27 of

1. *Commr. of Hindu Religious Endowment v. L. T. Swaminar*, 1954 SC 282.

2. 1954 SC 400 (403).

3. 1972 Ker LT 442 : 1974 Ker 48.

4. *Bira Kishore v. State*, 1976 Orissa 8 (11-12) ; *Raghunath v. State of Kerala*, 1974 Ker. 48.



the Constitution. Even if it is treated as tax, then Article 27 does not prevent the creation of an education fund for the advancement of education for a particular section of people. Making provision for the education of the citizens of India professing a particular religion, does not, amount to maintenance of that religion or the religious denomination. In that view of the matter there is no violation of Art. 27 of the Constitution.<sup>1</sup>

## Freedom as to attendance at religious instruction or religious worship in certain educational Institutions

### SYNOPSIS

21.1. Art. 28 of the Constitution.

#### 21.1. *Art. 28 of the Constitution.*

Article 28 of the Constitution provides that "No religious instruction shall be provided in any educational institution wholly maintained out of State funds.<sup>1</sup>

Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment of trust which requires that religious instruction shall be imparted in such institutions.<sup>2</sup>

No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.<sup>3</sup>

Article 26 (a) provides that every religious denomination or any section thereof shall have the right to establish and maintain an educational institution. This Article oversteps Art. 30.

"30. Right of minorities to establish and establish educational institutions—(1) All minorities, whether based on religion or language shall have the right to establish and administer educational institution of their choice.

(2) The State shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Under Article 26 (a) the right is given to a religious denomination. Article 30 (a) speaks of the rights of minorities based on religion.

1. *Constitution, Art. 28, clause (1).*

2. *Constitution, Art. 28, clause (2).*

3. *Constitution, Art. 28, clause (3).*

Religious liberty in education concerns both the individual (the parents acting for the child) and religious organizations within the frame work of the whole community and culture. Government should desire and require that the youth of the community receive training in ideals and habits of conduct, both individual and social, of high ethical quality. In most societies of the world, such ideals and morals are obviously of religious origin and with religious sanctions. They are found living and organic in the history, the literature the great personalities of cultural traditions both of the particular society and of the broad stream of civilization into which education should introduce the youth. The individual pupil is entitled to such knowledge, an important part of the truth that should be accessible to him from early years, and to the stimulus to conscience will and fellowship on a high plane which worship and other conscious religion might bring to his development.<sup>1</sup>

The Constitution does not forbid teaching about the differences between religious sects in classes in literature or history. "Indeed, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But, said Jackson J., it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. The inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences derived from Paganism, Buddhism, Hinduism, Judaism, Christianity, both Catholic and Protestant, Islam and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared. But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found "a Church without a Bishop and State without a King," is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammad."<sup>2</sup>

The expression "religious instruction" was narrowly construed by the Supreme Court in the *D. A. V. College's case*<sup>3</sup> to mean "that which is imparted for inculcating the tenets, the rituals, the observances, ceremonies and modes of worship of a particular sect or denomination." The trend of the Supreme Court decisions is to confine religion to the essential doctrine and the necessary ceremonies associated with it and not to extend it to secular or cultural activities.<sup>4</sup>

1. Bates : *Religious Liberty*, p. 324.

2. Jagdish Swarup : *Human Rights and Fundamental Freedoms*, p. 342.

3. 1971 SC 1731.

4. *Suresh Chandra v. Union of India*, 1976 Delhi 174.

## Cultural and Educational Rights

### SYNOPSIS

- 22.1. General object of Articles 29 and 30
- 22.2. Citizen—meaning of
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#### 22. 1. *General object of Articles 29, and 30.*

There is a large section of citizens residing in the territory of India which have a distinct language, script or culture of its own and it wants to conserve the same. The minorities whether based on religion or language quite understandably regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture. The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights.

Our Constitution has guaranteed certain cherished rights of the minorities concerning Cultural and Educational Rights, their language, culture and religion.

Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.<sup>1</sup>

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.<sup>2</sup>

All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.<sup>3</sup>

The State shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.<sup>4</sup>

Articles 29 and 30 confer four distinct rights. First is the right of any section of the citizens residing anywhere in India to conserve its own language, script or culture as mentioned in Article 29 (1). Second is the right of all religious and linguistic minorities to establish and administer educational institutions of their choice as mentioned in Article 30 (1). Third is the right of an educational institution not to be discriminated against in the matter of State aid on the ground that it is under the management of a religious or linguistic minority as mentioned in Article 30 (2). Fourth is the right of the citizen not to be denied admission into any State maintained or State aided educational institution on the ground of religion, caste, race or language, as mentioned in Article 29 (2).<sup>5</sup>

### 22.2. Citizen—meaning of

Article 29 (2) *ex facie* puts no limitation or qualification on the expression "citizen".

Now suppose the State maintains an educational institution conserving the distinct language, script or culture of a section of the citizens or makes grants in aid to an educational institution established by a minority community based on religion or language to conserve its distinct language, script or culture, who can claim the protection of Article 29 (2) in the matter of right of admission to any such institution?

Surely the citizens of the very section whose language, script or culture is sought to be conserved by the institution or the citizens who belong to the very minority group which has established and is administering the institution, do not need any protection against themselves and therefore Article 29 (2) is not designed for the protection of this section or this minority. Nor there is any reason to limit Article 29 (2) to citizens belonging to a minority group other than the section or the minorities referred to in Article 29 (1) or Article 30 (1), for the citizens, who do not belong to any minority group, may quite conceivably need this protection just as much as the citizens of such other minority groups.

If it is urged that the citizens of the majority group are amply protected by Article 15 and do not require the protection of Article 29 (2), then there are

1. Const. Art. 29 (1).
2. Const. Art. 29 (2).
3. Const. Art. 30 (1).
4. Const. Art. 30 (2).
5. *St. Xavier's College v. State of Gujarat*, 1974 SC 1389 (1394).

several obvious answers to that argument. The language of Article 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of Article 29 (2) extends against the State or anybody who denies the right conferred by it. Further Article 15 protects all citizens against discrimination generally but Article 29 (2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind which are maintained or aided by the State.

Article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29 (2) confers a specific right on all citizens for admission to educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make major contribution by way of taxes. There is, as the Supreme Court said, no cogent reason for such discrimination.

The heading under which Articles 29 and 30 are grouped together—namely “Cultural and Educational Rights” is quite general and does not in terms contemplate such differentiation. But the fact that the institution is maintained or aided out of State funds is the basis of this guaranteed right to all citizens, irrespective of whether they belong to the majority or minority groups. All are alike entitled to the protection of this fundamental right. Indeed in *State of Madras v. Smt. Champakam Dorairajan*<sup>1</sup> the court said :

“It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.”<sup>2</sup>

Where, however, a minority like the Anglo-Indian Community, which is based, *‘inter alia’*, on religion and language, has the fundamental right to conserve its language, script and culture under Article 29 (1) and has the right to establish and administer educational institutions of their choice under article 30 (1), surely then there must be implicit in such fundamental right, the right to impart instruction in their own institutions to the children of their own community in their own language. To hold otherwise will be to deprive Article 29 (1) and Article 30 (1) of the greater parts of their contents. Such being the fundamental right, the police power of the State to determine the medium of instruction must yield to this fundamental rights to the extent it is necessary to give effect to it, and cannot be permitted to run counter to it.<sup>3</sup>

### 22.3. *Anglo-Indian Schools.*

On the 16th December, 1953, the Inspector of Anglo-Indian Schools, Bombay State and Educational Inspector, Greater Bombay, sent a circular letter to the Headmaster of Barnes High School intimating that the Government had under consideration the issue of orders regulating admissions to schools in which the medium of instruction was English.

The orders under consideration were stated to be on the following lines, namely, (1) that from the next school year admissions to English medium

1. 1951 SC 226 (227).

2. *State of Bombay v. Bombay Education Society*, 1954 SC 560 (566).

3. *Ibid*, p. 568.

School should only be confined to children belonging to the Anglo-Indian and European communities, and (2) that those pupils who, prior to the issue of the Orders, were studying in recognized Primary or Secondary English medium schools, could continue to do so. The letter in conclusion advised the Headmaster not to make any admission for the academic year beginning from January, 1954 of pupils other than Anglo-Indians or Europeans.<sup>1</sup>

Accordingly on the 1st February, 1954, Dr. Gujar accompanied by his son approached the Headmaster of Barnes High School seeking admission for his son to the said school but the Headmaster, in view of the Government Circular Order felt bound to turn down such request as the boy did not belong to the Anglo-Indian Community and was not of non-Asiatic descent, although he had all the necessary qualifications for admission to the school.<sup>2</sup>

Several applications under Article 226 of the Constitution were filed in the Bombay High Court. On the facts of these cases two questions arose, namely (1) as to the right of students who were not Anglo-Indians or who were of Asiatic descent to be admitted to Barnes High School which was a recognized Anglo-Indian School which imparted education through the medium of English, and (2) as to the right of the said Barnes High School to admit non-Anglo-Indian students and students of Asiatic descent. In regard to the first question the Supreme Court held that the impugned order offended the fundamental right guaranteed to all citizens by Article 29 (2). The second question was also decided against the State.

“Special provisions relating to Article 337 of the Constitution secures to the Anglo-Indian Community certain special grants made by the Union and by each State in respect of education. The second paragraph of that Article provides for progressive diminution of such grant until such special grant ceases at the end of ten years from the commencement of the Constitution as mentioned in the first proviso to that Article. The second proviso provided that no educational institution shall be entitled to receive any grant under the Article unless at least forty per cent of the annual admissions therein were made available to members of communities other than the Anglo-Indian Community.”

It is clear, therefore, that the Constitution has imposed upon the educational institution run by the Anglo-Indian Community, as a condition of such special grant, the duty that at least 10 per cent of the annual admissions therein must be made available to members of communities other than the Anglo-Indian Community. This is undoubtedly a constitutional obligation. In so far as clause (5) of the impugned order enjoins that no primary or secondary school shall from the date of this order admit to a class where English was used as the medium of instruction any pupil other than the children of Anglo-Indians or of citizens of non-Asiatic descent, it quite clearly prevents the Anglo-Indian School including Barnes High School from performing their Constitutional obligations and exposes them to the risk of losing the special grant.

#### 22.4. *Establish—Meaning of*

What does the word “establish” in Article 30 (1) mean? In *Aziz Basha v. Union of India*<sup>3</sup> the Supreme Court held that for the purpose of Article 30 (1) the word ‘establish’ means “to bring into existence”, and so the right

1. *State of Bombay v. Bombay Education Society*, 1954 SC 560 (563).

2. *Ibid.* p. 564.

3. 1968 SC 662.

given by Article 30 (1) to the minority is to bring into existence an educational institution, and if they do so, to administer it.

In *Aziz Basha v. Union of India*<sup>1</sup> the Supreme Court considered the question whether the Aligarh University was established by the Muslim minority. It was held that it was possible for the Muslim community to establish a University before the Constitution came into force though the degrees conferred by such a University may not be found to be recognised by Government. After 1956 the University Grants Committee Act prohibits the use of the word 'University' by an educational institution unless it was established by law.

In *Aziz Basha v. Union of India*<sup>2</sup> it was argued that even though the religious minority may not have established the educational institution, it will still have the right to administer it, if by some process it had been administering the same before the Constitution came into force. The Supreme Court did not accept this argument. Wanchoo, J. said : "The Article clearly shows that the minority will have the right to administer educational institutions of their choice provided they had established them, but not otherwise. The Article cannot be read to mean that even if the educational institution had been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force."

The words "establish" and "administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution, provided it has been established by it. In re : The Kerala Education Bill, 1957,<sup>3</sup> an argument was raised that under Article 30 (1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by the Supreme Court for the obvious reason that if that interpretation was given to Article 30 (1) it would be robbed of much of its content. But that case did not lay down that the words "establish and administer" in Article 30 (1) should be read disjunctively, so that though a minority might not have established an educational institution it had the right to administer it. It is true that the Court spoke of Article 30 (1) giving two rights to a minority *i. e.* (i) to establish and (ii) to administer. But that was said only in the context of meeting the argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30 (1). Nothing in that case justifies the contention that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30 (1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the right to administer it.<sup>4</sup>

In *In re Kerala Education Bill*<sup>5</sup> it was contended that the educational institutions established by one or more members of any of minority communities prior to the commencement of the Constitution would not be entitled to the benefits of Article 30 (1). But Das, C. J. said "We do not think the protection and privilege of Article 30 (1) extends only to the educational

1. 1968 SC 662.

2. *Ibid.*

3. 1957 SC 933 ; 1958 SC 916.

4. 1968 SC 662 (470).

5. 1958 SC 916 ; 1958 SC 933.



institutions established after the date of the Constitution came into operation or which may hereafter be established. The fallacy of this argument becomes discernible as soon as we direct our attention to Article 19 (1) (g) which, clearly enough, applies alike to a business, occupation or profession already started and carried on as to those that may be started and carried on after the commencement of the Constitution. There is no reason why the benefit of Article 30 (1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30 (1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30 (1) gives the minorities two rights, namely (a) to establish and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Article 26 covers the right to maintain pre-Constitution religious institutions.

### 22.5. *Minority*

As soon as we reach Article 30 (1) at once the question arises : What is a minority ? That is a term which is not defined in the Constitution. It is easy to say that a minority community means a community which is numerically less than 50 per cent, but then the question is not fully answered, for part of the question has yet to be answered, namely, 50 per cent, of what ? Is it 50 per cent of the entire population of India or 50 per cent of the population of a State forming a part of the Union ? The position taken up by the State of Kerala in its statement of case filed in *re the Kerala Education Bill*<sup>1</sup> herein is as follows :

“There is yet another aspect of the question that falls for consideration, namely as to what is a minority under Article 30 (1). The State contended that Christians who opposed the Bill were not in minority in the State. It was no doubt true that Christians were not a mathematical majority in the whole State. They constituted about one-fourth of the population ; but it did not follow therefrom that they formed a minority within the meaning of Article 30 (1). The argument that they did, if pushed to its logical conclusion, would mean that any section of the people forming under fifty per cent of the population should be classified as a minority and be dealt with as such.”

In *Ramani Kanta Bose v. Gauhati University*<sup>2</sup> it was held that persons who were alleged to be a minority must be a minority in the particular region in which the institution involved was situated.

The State of Kerala, contended that in order to constitute a minority which may claim the fundamental rights guaranteed to minorities by Articles 29 (1) and 30 (1) persons must numerically be a minority in the particular region in which the educational institution in question was or was intended to be situate. But Das, C. J. said : “A little reflection will at once show that this was not a satisfactory test. Where is the line to be drawn and which is the unit which will have to be taken ? Are we to take as our unit a district, or a subdivision or a taluk or a town or its suburbs or a municipality or its wards ? It is well known that in many towns persons belonging to a particular community flock together in a suburb of the town or a ward of the municipality.”

The Supreme Court did not on this occasion go further into the matter and did not express a final opinion as to whether education being a State subject being item 11 of List II of the Seventh Schedule to the Constitution

1. 1958 SC 956.

2. 1951 Assam 163 ; In *re Kerala Education Bill*, 1957, 1958 SC 956 (976).

subject only to the provisions of entries 62, 63, 64 and 66 of List I and entry 25 of List III, the existence of a minority community should in all circumstances and for purposes of all laws of that State be determined on the basis of the population of the whole State or whether it should be determined on the State basis only when the validity of a law extending to the whole State is in question or whether it should be determined on the basis of the population of a particular locality when the law under attack applies only to that locality.<sup>1</sup>

In *D. A. V. College v. State of Punjab*<sup>2</sup> a faint attempt was made to canvass the position that religious or linguistic minorities should be minorities in relation to the entire population of the country, but the Supreme Court said that they were to be determined only in relation to the particular legislation which was sought to be impugned, namely that if it was the State Legislature these minorities had to be determined in relation to the population of the State.

The passages read above show beyond doubt that the Arya Samaj by "rejecting the manifold absurdities found in Smritis and in tradition and in seeking a basis in the early literature for a purer and more rational faith" can be considered to be a religious minority, at any rate as part of the Hindu religious minority in the State of Punjab.<sup>4</sup>

It is clear that the Arya Samajis have a distinct script of their own, namely Devnagri. They are therefore entitled to invoke the right guaranteed under Article 29 (1) because they are a section of citizens having a distinct script and under Article 30 (1) because of their being a religious minority.<sup>5</sup>

Under these provisions the Arya Samaj through its educational institutions have the right to conserve its script, culture and its language.<sup>6</sup>

## 22.6. Linguistic and Religious minority

A linguistic minority for the purpose of Article 30 (1) is one which must at least have a separate spoken language. It is not necessary that language should also have a distinct script for those who speak it to be a linguistic minority. There are in this country some languages which have no script of their own, but nonetheless those sections of the people who speak that language will be a linguistic minority entitled to the protection of Article 30 (1).<sup>8</sup>

## 22.7. Minority not foreigners

The minority competent to claim the protection of Article 30 (1) and on that account the privilege of maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer on foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well defined religious or linguistic minority. It is not, however predicated, said Shah, J., that protection of the right, guaranteed under Article 30 may be availed of only in respect of an institution established before the Constitution by persons born and resident in British India.<sup>7</sup>

1. In re Kerala Education Bill, 1957, 1958 SC 957 (976-7) ; 1971 SC 1737 (1742).

2. 1971 SC 1737 (1742).

3. *D. A. V. College, Jullundur v. State of Punjab*, 1971 SC 1737 (1742).

4. *Ibid.*, p. 1744.

5. *Ibid.*, p. 1744.

6. *Ibid.*

7. *S. K. Patre v. State of Bihar*, 1970 SC 259 (263).

The fact that funds were obtained from foreign countries for assisting in setting up and developing the school or that the management of the Institution was carried on by some persons who may not have been born in India is not a ground for denying the protection of Article 30 (1).<sup>1</sup>

Before any protection can be claimed under Article 30 (1), it is not necessary that all persons or a majority of them who established the institution were 'Indian citizens'. To incorporate in the interpretation of Article 30, in respect of an institution established by a minority, the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution.<sup>2</sup>

In *Rev Father Proost v. State of Bihar*<sup>3</sup> it was contended that the college did not qualify for the protection of Article 30 because it was not founded by the Jesuit Community, a minority community based on religion, to conserve their language, script or culture of its own. Reliance was placed on some observations made by the Supreme Court in *In re Kerala Education Bill*.<sup>4</sup> Explaining Clause (1) of Article 29 the Court observed : "It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred by Article 30."

Hidayatullah, C. J. while dealing with Articles 29 (1) and 30 (1) said "In our opinion, the width of Article 30 (1) cannot be cut down by introducing in it considerations on which Article 29 (1) is based. The latter article is a general protection which is given to minorities to conserve their language, script or culture. The former is a special right to minorities to establish educational institutions of their choice. The choice is not limited to institution, to conserve language, script or culture and the choice is not taken away if the minority community having established an educational institution of its choice also admits members of other communities. That is a circumstance irrelevant for the application of Article 30 (1) since no such limitation is expressed and none can be implied. The two Articles create two separate rights, although it is possible that they may meet in a given case."<sup>5</sup>

Article 30 does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have the right to establish educational institutions for teaching their language only. What the article says and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice.<sup>6</sup> There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also. In other words

1. S. K. Patro v. State of Bihar, 1970 SC 259 (264).

2. Ibid.

3. 1969 SC 465.

4. 1959 SCR 995 : 1958 SC 956.

5. *Rev Father Proost v. State of Bihar*, (1969) 2 SCR 73 ; 1969 SC 465 (468-469).

6. *In re Kerala Education Bill*, 1957, 1958 SC 956 (978-979).

the article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children. The key to the understanding of the true meaning and implication of Article 30 (1) are the words "of their own choice". It is said that the dominant word is "choice" and the content of that article is as wide as the choice of the particular minority community may make it. The ambit of the rights conferred by the Article has, therefore, to be determined on a consideration of the matter from the points of view of the educational institutions themselves. The educational institutions established or administered by the minorities or to be so established or administered by them in exercise of the rights conferred by that Article may be classified into three categories, namely, (1) those which do not seek either aid or recognition from the state, (2) those which want aid, and (3) those which want only recognition but not aid.<sup>1</sup>

### 22.8. *Establishment and Administration by some minority community*

The Constitution gives to the minorities right to establish educational institutions of their choice and to administer them. It is not necessary that those who established an institution should also administer them. It would be enough if members of the same minority community administer the institution. The members of the minority community may form themselves into a society registered under the Society Registration Act, 1860 and the administration of the institution may be done by the Society. So long the members of the Society belong to the minority community, it should make no difference if some of the members of the Society do not belong to minority community which established the institution. Since the Society is not a corporation the administration of the institution by the society should be deemed to be administration by the members constituting the society. In many cases which came to the courts the persons who claimed the right under Article 30 of the Constitution were Societies.

Incidentally, in dealings with the right under Article 30 (1) and the extent of the states education is intended to develop the commonness of boys and girls of our country. This is in the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are not given protection under Article 30 to establish and administer educational institutions of their choice, they will feel isolated and separate. General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole.<sup>2</sup>

### 22.9. *Article 30—Two rights*

Article 30 (1) contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions by the minorities of their choice. Establishment "here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means funds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities can take advantage of these institutions. Such others from differ-

1. In re Kerala Education Bill, 1957, 1958 SC 956 (978-9).

2. St. Xavier's College v. State of Gujarat, 1974 SC 1374 (1395).

ent communities bring in income and they do not have to be turned away to enjoy the protection of Article 30 (1).

The next part of the right relates to the administration of such institutions. Administration "means management of the affairs of the institution". This management must be free of control so that the founders or their nominee can mould the institution as they thought fit so that it may serve the community in general and the institution in particular best. No part of their management can be taken away and vested in another body without encroachment upon the guaranteed right.<sup>1</sup>

Articles 29 and 30 are set out in Part III of our Constitution which guarantees our fundamental rights. They are grouped together under the sub-head "Cultural and Educational Rights." The text and the marginal notes of both the articles show that their purpose is to confer those fundamental rights on certain sections of the community which constitute minority communities. Under clause (1) of Article 29 any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30 (1). This right, however, is subject to clause (2) of Article 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.<sup>2</sup>

As to third condition mentioned above, the argument carried to its logical conclusion comes to this that if a single member of any other community is admitted into a school established for the members of a particular minority then the educational institution ceases to be an educational institution established by a minority community which does not seek any aid from the funds of the State need not admit a single scholar belonging to a community other than that for whose benefit it was established, but that as soon as such an educational institution seeks and gets aid from the State coffers Article 29 (2) will preclude it from denying admission to members of the other communities on grounds only of religion, race, caste, language or any of them and consequently it will cease to be an educational institution of the choice of the minority community which established it. This argument does not appear to us to be warranted by the language of the article itself. There is no such limitation in Article 30 (1) and to accept this limitation will necessarily involve the addition of the words "for their own community" in the article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Article 29 (2) was to deprive minority educational institutions of the aid they receive from the State. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admits such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. The real import of Article 29 (2) and Article 30 (1) seems to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member

1. *State of Kerala v. Rev. Mother Provincial*, 1970 SC 2079 (2082).

2. *In re Kerala Education Bill*, 1957, 1958 SC 956 (976).

into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community. In our opinion it is not possible to read this condition into Article 30 (1) of the Constitution.<sup>1</sup>

It will be wrong to read Article 30 (1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. A minority may administer an institution for religious education unconnected with any question of conserving a language, script or culture.<sup>2</sup>

## 22.10. Regulation

Article 30 (1) though couched in absolute and spacious terms in marked contrast with other fundamental rights in Part III, has to be read subject to the regulatory power of the State. Though the Supreme Court has consistently recognized this power of the State as constituting an implied limitation upon the right guaranteed under Article 30 (1), the entire controversy has centred around the extent of its regulatory power over minority educational institutions.<sup>3</sup>

*In re the Kerala Education Bill, 1957*<sup>4</sup> S. R. Das, C. J. explained the content of the right under Article 30 (1) of the Constitution, in these words : "We have already observed that Article 30 (1) gives two rights to the minorities (1) to establish and (2) to administer educational institutions of their choice. The right to administer cannot obviously include the right 'to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teacher possessing any semblance of qualification and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason then that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided."

Thus, a contention based on the absolute freedom from State control of the minorities' right to administer their educational institutions was expressly negated in this case. The Court clearly laid down a principle, namely, a regulation, which is not destructive or annihilative of the core or the substance of the right under Article 30 (1) could legitimately be imposed. No educational institutions can in actual practice be carried on without aid from the state and if they will not get it unless they surrender their rights they will, by compulsion of financial necessities be compelled to give up their rights under Article 30 (1). Government should take no steps which may amount to the institution surrendering its personality merely because the institution is securing aid from the government."<sup>5</sup>

*In Rev. Sidhajibhai, Sabhai vs. State of Gujarat*,<sup>6</sup> Shah, J. speaking for the Court, negated an argument advanced on behalf of the State that a law

1. *In re The Kerala Education Bill, 1957*, 1958 SC 956 (978)

2. *St. Xavier's College v. State of Gujarat*, 1974 SC 1389 (1394).

3. *Lilly Kurian v. Sr. Lewina*, 1979 SC 52 (59).

4. 1959 SCR 495 : 1958 SC 956.

5. *Ibid.*

6. (1963) 3 SCR 837 : 1963 SC 540.

could not be deemed to be unreasonable unless it was totally destructive or annihilative of the right under Article 30 (1), stating : "The right established by Article 30 (1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19, it is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30 (1) will be but a 'teasing illusion', a promise of unreality.

"Regulation which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test—the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

The extent of the regulatory power of the State was explained by Shah, J. thus : "This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right. The fundamental freedom is to establish and to administer educational institution ; it is a right to establish and administer what are in truth educational institution which cater to the educational needs of the citizens, or sections thereof. Regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed ; they secure the functioning of the institution, in matters educational."

Incidentally, in dealing with the right under Article 30 (1) and the extent of the State's power of regulatory control of such right, the Supreme Court in *State of Kerala v. Rev. Mother Provincial*<sup>1</sup> observed : "Administration means management of the affairs of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."

"There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if Universities establish syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the state to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the

standards of excellence expected of educational institutions or under the guise of exclusive right of management to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others.<sup>1</sup>

"The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution"<sup>2</sup> "Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institution." Ray, C. J. has observed that "Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The university will always have a right to see that there is no maladministration. If there is mal-administration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students."<sup>3</sup>

"The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C. J. in the *Kerala Education Bill* case,<sup>4</sup> summed up in one sentence the true meaning of the right to administer by saying that the right to administer an educational institution of their choice cannot mean a right to mal-administer. This right does not necessarily militate against the claim of the state to insist that in order to grant aid the state may prescribe reasonable regulations to ensure the excellence of the institution to be aided.

Mr. Justice Khanna stressed what is sometimes ill-remembered. The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give the minorities a sense of security and a feeling of confidence.

"It is permissible to make regulations for ensuring the regular payment of salaries before a particular date of the month. Regulations may well provide that the funds of the institution should be spent for the purposes of education or for the betterment of the institution and not for extraneous purposes." And, after itemising, illustratively, other permissible contents observed "a regulation which is designed to prevent maladministration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulations nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice."

The University can always prescribe regulations and insist that they should be complied with before it would grant affiliation or recognition to an educational institution. To deny the power of making regulations to the

1. *State of Kerala v. Rev. Mother Provincial*, 1970 SC 2079 (2082).

2. *St Xavier's College v. State of Gujarat*, 1974 SC 1374. (1398).

3. *Ibid.* p. 1399.

4. *In re Kerala Education Bill*, 1957, 1958 SC 956.



authority concerned would result in robbing the concept of affiliation or recognition of its real essence.<sup>1</sup>

"It would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spite of the unrestricted nature of the right". In short, the view which appealed to Khanna J. shows that the law, to be constitutional, should not impair the minorities' right but may be promotional in the sense of making the purpose of the institution more productive. Mathew, J. illumined the amplitude of the right under Article 30 but did not dissent from the validity of putting on that right regulatory harness. In a pithy statement, this point has been made by the learned Judge. No right, however absolute, can be free from regulation. The spiritual seed of this though is found in the Holmesian observation extracted by him.

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."<sup>2</sup>

The various decisions of the Supreme Court where legislative fetters have been struck down are cases in contrast.

In the *Kerala Universities Act case*<sup>3</sup> Sections 48 and 49 of those sections were found by the Supreme Court to have effect of displacing the administration of the college and giving it to a distinct corporate body which was in no way answerable to the institution. The minority community was found to lose the rights to administer the institution it founded. The governing body contemplated in those sections was to administer the colleges in accordance with the provisions of the Act statutes, ordinances, regulations, bye-laws and orders made thereunder. The powers and functions of the governing body, the removal of the members and the procedure to be followed by it were all to be prescribed by the statutes. These provisions the Supreme Court held amounted to vesting the management and administration of the institution in the hands of bodies with mandates from the University.<sup>4</sup>

"The Supreme Court in *Rev. Fr. W. Proost case*<sup>5</sup> held that Section 48-A of the Bihar Universities Act which came into force from 1st March, 1962, completely took away the autonomy of the governing body of St. Xavier's College established by the Jesuits of Ranchi. Section 48-A of the said Act provided *inter alia* that appointments, dismissals, removals, termination of service by the governing body of the college were to be made on the recommendation of the University Service Commission and subject to the approval of the University. There were other provisions in that section, *viz.* that the commission would recommend to the governing body names of persons in order of preference and in no case could the governing body appoint a person who was not recommended by the University Service Commission."

In *Rev. Bishop Patro v. State of Bihar*,<sup>6</sup> the State of Bihar requested the Church Missionary Society School, Bhagalpur to constitute a managing

1. *St. Xavier's College v. State of Gujarat*, 1974 SC 1374 (1423).

2. *Ibid* p. 1441.

3. 1970 SC.

4. 1974 SC 1389 (1397).

5. 1969 2 SCR 73 : 1969 SC 465.

6. (1970) 1 SCR 172 ; 1970 SC 259.

committee of the school in accordance with an order of the State. The Supreme Court held that the State authorities could not require the school to constitute a managing committee in accordance with their order."

The Gujarat case of *St. Xavier*,<sup>1</sup> Sections 40 and 41 and Section 38 shackled the management, trenching seriously upon the right to administer, and these provisions were as unconstitutional.

An analysis of the judgments in *St. Xavier's College's* case (supra) clearly shows that seven out of nine Judges held that the provisions contained in clause (b) of sub-sections (1) and (2) of Section 51-A of the Act were not applicable to an educational institution established and managed by religious or linguistic minority as they interfered with the disciplinary control of the management over the staff of its educational institutions. The reasons given by the majority were that the power of the management to terminate the services of academic and non-academic staff was based on the relationship between an employer and his employees and no encroachment could be made on this right to dispense with their services under the contract of employment, which was an integral part of the right to administer, and that these provisions conferred on the Vice-Chancellor or any other officer of the University authorised by him, uncanalised, unguided and unlimited power to veto the actions of the management. According to the majority view, the conferral of such blanket power on the Vice-Chancellor and his nominee was an infringement of the right of administration guaranteed under Article 30 (1) to the minority institutions, religious and linguistic. The majority was accordingly of the view that the provisions contained in clause (b) of sub-sections (1) and (2) of Section 51-A of the Act had the effect of destroying the minority institution's disciplinary control over the teaching and non-teaching staff of the college as no punishment could be inflicted by the management on a member of the staff unless it gets approval from an outside authority like the Vice-Chancellor or an officer of the University authorised by him. On the contrary, the two dissenting Judges were of the view that these provisions were permissive regulatory measures.<sup>2</sup>

The power of appeal conferred on the Vice-Chancellor under Ordinance 33(4) is not only a grave encroachment on the institution's right to enforce and ensure discipline in its administrative affairs but it is uncanalised and unguided in the sense that no restrictions are placed on the exercise of the power. The extent of the appellate power of the Vice-Chancellor is not defined : and, indeed, his powers are unlimited. The grounds on which the Vice-Chancellor can interfere in such appeals are also not defined. He may not only set aside an order of dismissal of a teacher and order his reinstatement, but may also interfere with any of the punishments enumerated in items (ii) to (v) of Ordinance 33 (2), that is to say, he can even interfere against the infliction of minor punishments. In the absence of any guidelines, it cannot be held that the power of the Vice-Chancellor under Ordinance 33 (4) was merely a check on maladministration.

In *Lilly Kurian v. Sr. Lewina*<sup>3</sup> the Vice-Chancellor, University of Kerala by his two orders held that the orders of dismissal from service were illegal, null and void and directed the management to allow the appellant to function as principal.

As laid down by the majority in *St. Xavier's College's* case (supra) such a blanket power directly interferes with the disciplinary control of the manag-

1. 1974 SC 1399.

2. *Lilly Kurian v. Sr. Lawina*, 1979 SC 32 (64).

3. *Ibid.*

ing body of a minority educational institution over its teachers. The majority decision in *St. Xavier's College's case*<sup>1</sup> squarely applies to the facts of the present case and accordingly it must be held that the impugned Ordinance 33 (4) of the University of Kerala is violative of Article 30 (1) of the Constitution. If the conferral of such power on an outside authority like the Vice-Chancellor, which while maintaining the formal character of a minority institution destroys the power of administration, that is, its disciplinary control, is held justifiable because it is in the public and national interest, though not in its interest as an educational institution, the right guaranteed by Article 30 (1) will be, to use the well-known expression, a 'teasing illusion', a 'promise of unreality.'<sup>2</sup>

#### 22.11. Administrative Committee

In *Gan'hi Faiz-E-Am. College v. University of Agra*<sup>3</sup> the college management applied to the university for permission to start teaching in courses of study including Sociology, Sanskrit, Arabic, Military Studies, Drawing etc. The university was willing to grant recognition applied for up to the B. A. standard provided provision was made in the constitution for representation of the Principal, and Head of Department to be chosen in order of seniority every year on the managing committee of the College and other condition had been fulfilled. It relied on statute 14-A which required that every college when affiliated must be under the management of a Committee on which the staff of the college shall be represented by the Principal of the College and at least two representatives of the teachers of the college to be appointed by rotation in order of seniority." The college challenged the vires of statute 14-A and legality of the directive. The Supreme Court by majority held that the impugned statute left almost unaffected the total integrity of the administration by the religious group save in the minimal inclusion of two internal entities, viz. the Principal of their own choice and the senior most teachers independently appointed by them. It was further said that the regulatory clauses challenged, really improved the administration and did not inhibit the autonomy and were therefore good and valid. Mathew, J. in a dissenting judgment said that the minority community had the exclusive right to rest the administration of the college in a body of its own choice and any compulsion from an outside authority to include any other person, in that body was an abridgment of its fundamental right to administer the educational institution."<sup>4</sup>

The order passed by the Educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary School to take steps to constitute a Managing Committee in accordance with the order dated, May 22, 1967 was declared invalid.

#### 22.12. Discipline

In *All Saints High School v. Government of A. P.*<sup>5</sup>, the validity of Sections 3 (1), 3 (2), 3 (3); Sections 4 and 6 of the A. P. recognised Private Educational Control Act 11 of 1975 was considered by the Supreme Court. Section 3 (1) (2), gave unqualified mandate that no teacher shall be dismissed, removed etc except with the prior approval of the competent authority and contravention of the section would result in a total invalidation of the proposed action. An order of termination simpliciter which involved no stigma

1. 1974 SC 1389.
2. (1979) 2 SCR 283. 1980 SC 1042
3. Lilly Kurian v. Sr. Lewina, 1979 SC 52 (64).
4. (1975) 2 SCC 283 (302).
5. (1980) 2 SCC 478,

or aspersion and which did not result in any evil consequences was also required to be submitted for the prior approval of the competent authority. Sub-section (2) provided that the competent authority 'shall' approve the proposal," if it was satisfied there were adequate and reasonable grounds" for the proposal the absence of rules to be framed by the State Government on the subject made the unguided discretion of the competent authority the sole arbiter of the question as to which cases would fall within the section and which would fall outside it. The authority was indeed made a Judge both of facts and law by conferment upon it, of a power to test the validity of the proposal on the verity subjective touch stone of adequacy and reasonableness. Chandrachud, J. agreeing with Fazal Ali, J. held that Sections 3 (1) and 3 (2) could not be applied to minority institutions as these constituted an infringement of the right guaranteed by Article 30 (1) of the Constitution.

Discipline cannot be equated with dictatorial methods in the treatment of teachers. In the name of discipline and management no educational institution could be given the right to "hire and fire" its teachers. After all, though the management may be left free to evolve administrative policies of an institution, educational instruction has to be imparted through the instrumentality of the teachers; and unless, they have a constant assurance of justice, security and fair play, it will be impossible for them to give their best which alone can enable the instruction to attain the ideal of educational excellence. Section 3 (3) (a) of the A. P. Recognised Private Educational Institutions (Control) Article 11 of 1975 provided that no teacher shall be placed under suspension except when an enquiry into the gross misconduct of such teacher is contemplated. Section 3 (3) (b) provided that no such suspension shall not remain in force for more than a period of two months, and if the enquiry was not completed within that period, the teacher shall without prejudice to the enquiry be deemed to have been restored as a teacher." Chandrachud, C. J. agreeing with Kailasham, J. (Fazal Ali J. dissenting) held that these two sections did not offend against the provisions of Article 30 of the Constitution and were valid. In *All Saints High School v. Government of A. P.*<sup>1</sup> Section 3 (2) (a) was regulatory in character since it either denied to the management the right to proceed against an erring teacher nor did it place an unreasonable restraint on its power to do so.

The court had made it very clear that the observations extracted above applied to those categories of educational institutions which had sought not only recognition but also aid from the State. In the instant case, most of the appellant institutions had been established by mustering their own resources and had not been receiving substantial aid from the government. Similarly, the court made it clear that although the minority institutions had no fundamental right to recognition by the State yet to deny recognition on terms which may amount to complete surrender of the management of the institution to the government would be violative of Article 30 (1) of the Constitution. In this connection, Das, C. J. observed<sup>2</sup> as follows: "There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30 (1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law."

1. (1980) 2 SCC at p. 489) Sect. 3 (3) (a).

2. In re Kerala Education Bill, 1957, 1958 SC 950.

It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, script or culture by and through educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30 (1).<sup>1</sup>

Describing the nature of the fundamental rights enshrined in Article 30 the court observed as follows: "Our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have been made to them for good and valid reasons. Article 45, no doubt, requires the State to provide for free and compulsory education for all children, but there is nothing to prevent the State from discharging that solemn obligation through government and aided schools and Article 45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own."

Similarly, Venkatarama Aiyar, J. who gave a dissenting opinion agreed however with the scope of Article 30 as expounded by the majority opinion. In this connection, the learned Judge observed as follows: "Article 30 (1) belongs to the same category as Articles 25, 26 and 29, and confers on minorities, religious or linguistic, the right to establish and maintain their own educational institutions without any interference or hindrance from the State. The true intention of that Article is to equip minorities with a shield whereby they could defend themselves against attacks by majorities, religious or linguistic and not to arm them with a sword whereby they could compel the majorities to grant concessions".

### 22.13. *Affiliation*

There is no express grant of the right of affiliation in Article 30 (1). It is not also necessarily implied in Article 30 (1). The reasons are these: (1) the context does not favour the asserted implication. The framers of the Constitution have taken special care to dissipate doubts as regards choice by the words 'of their choice'. They have also taken special care to extend a guarantee to a minority educational institution against discrimination in the matter of aid from the State on the ground that it is under the management of a minority based on religion or language. If they had intended to elevate the right of affiliation to the status of a fundamental right, they could have easily expressed their intention in clear words in Article 20. It is obvious that a minority institution imparting only religious instruction or teaching its own theology would neither need nor seek affiliation. It would not seek affiliation because affiliation is bound to reduce its liberty at least to some extent. Again, as our State is secular in character, affiliation of an institution imparting religious instruction or teaching only theology of a particular religious minority may not comport with the secular character of the State. As Article 30 (1) does not grant the right of affiliation to such an institution, it cannot confer that right on an institution imparting secular general education.

Affiliation to a University really consists of two parts. One part relates to syllabi, curricula, courses of instruction, the qualifications of teachers, library, laboratories, conditions regarding health and hygiene of students. This part relates to establishment of educational institutions. The second part

1. *All Saints High School v. Govt. AP.*, (1980) 2 SCC 478 (484).

consists of terms and conditions regarding management of institution. It relates to administration of educational institution.

“Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations.” That is the price of recognition or affiliation.<sup>1</sup>

In other words, recognition or affiliation is a facility which the University grants to an educational institution.

No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone without forcing on it a stranger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous Management alone is asked for, the provision is salutary and saved, being not a dictate eroding the freedom of the freedom.

The religious or linguistic minorities who have the right to establish and administer educational institution of their choice do not have any fundamental right to affiliation, to a university.<sup>2</sup> When a minority institution applies to a University to be affiliated, it expresses its choice to participate in the system of general education and courses of instructions prescribed by that University.<sup>3</sup> With regard to affiliation a minority institution must follow the statutory measures regulating educational standards and efficiency. The prescribed courses of study, courses of instructions and the principles regarding the qualification of teachers, educational qualification for entry of students into educational institutions etc.

It is permissible for the State to prescribe reasonable regulations and make it a condition precedent to the according of recognition or affiliation to a minority institution. It is not, however, permissible to prescribe conditions for recognition or affiliation which have the effect of impairing the right of the minority to establish and administer their educational institutions. Affiliation and recognition are, no doubt, not mentioned in Article 30 (1), the position all the same remains that refusal to recognize or affiliate minority institutions unless they (the minorities) surrender the right to administer those institutions would have the effect of rendering the right guaranteed by Article 30 (1) to be wholly illusory and indeed a teasing illusion. It is, not permissible to exact from the minorities in lieu of the recognition or affiliation of their institutions price which would entail the abridgement or extinguishment of the right under Article 30 (1). An educational institution can hardly serve any purpose or be of any practical utility unless it is affiliated to a University or is otherwise recognized like other educational institutions. The right conferred by Article 30 is a real and meaningful right. It is neither an abstract right nor is it to be exercised in vacuum. Article 30 (1) was intended to have a real significance and it is not permissible to construe it in such a manner as would rob it of that significance.

“Without recognition, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their

1. *St Xaviers College v. State of Gujarat*, 1974 SC 1389 (1442).

2. *Ibid.*, p. 1375; *Gandhi Faiz-e-Am College v. University*, (75) 2 SCC 283.

3. *Ibid.* p. 1396.

choice and the rights under Article 30 (1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions, which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right to administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30 (1). The legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law.

Over the years, the Supreme Court has held that without recognition or affiliation, there can be no real or meaningful exercise of the right to establish and administer educational institutions under Article 30 (1).<sup>1</sup>

The power to withhold recognition or affiliation altogether does not carry with it unlimited power to impose conditions which have the effect of restraining the exercise of fundamental rights. The normal desire to enjoy privileges like affiliation or recognition without which the educational institutions established by the minority for imparting secular education will not effectively serve the purpose for which they were established, cannot be made an instrument of suppression of the right guaranteed.

There is no fundamental right of a minority institution to affiliation. An explanation has been put upon that statement of law. It is that affiliation must be a real and meaningful exercise for minority institutions in the matter of imparting general secular education. Any law which provides for affiliation on terms which will involve abridgement of the right of linguistic and religious minorities to administer and establish educational institutions of their choice will offend Article 30 (1). The educational institutions set up by minorities will be robbed of their utility if boys and girls cannot be trained in such institutions for University degrees. Minorities will virtually lose their right to equip their children for ordinary careers if affiliation be on terms which would make them surrender and lose their rights to establish and administer educational institutions of their choice under Article 30. The primary purpose of affiliation is that the students reading in the minority institutions will have qualifications in the shape of degrees necessary for a useful career in life. The establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a University for the purpose of conferment of degrees on students.

The heart of the matter is that no educational institution established by a religious or linguistic minority can claim total immunity from regulations by the legislature or the university if it wants affiliation or recognition.<sup>2</sup>

The price of affiliation cannot be a total abandonment of the right to establish and administer a minority institution conferred by Article 30 (1) of the Constitution. Their choice and the rights under Article 30 (1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will

1. In re: The Kerala Education Bill, 1957 (1978) SC 984 (985); *Rev. Sidhajibhai Sabhai and others v. State of Bombay*, 1963 SC 540 (856) and *D. A. V. College etc. v. State of Punjab and others*, 1971 SC 1737 (1742).
2. *St. Xavier's College v. State of Gujarat*, 1974 SC 1389 (1395).

effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice. is in truth and in effect to deprive them of their rights under Article 30 (1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law. According to the decisions of this Court referred to above, in judging the validity of any law regard must be had to its real intendment and effect on the rights of the aggrieved parties, rather than to its form. According to the Educational Codes certain conditions are prescribed whether as legislative or as executive measures we do not stop to enquire as conditions for the grant of recognition and it is said, as it was said during the discussion to the question of aid, that the said Bill imposes no more burden than what these minority educational institutions along with those of other communities are already subjected to. As we have observed, there can be no question of the loss of a fundamental right merely by the non-exercise of it. There is no case here of any estoppel, assuming that there can be any estoppel assuming that there can be any estoppel against the Constitution. Therefore, the impugned provisions of the said Bill must be considered on its merits".<sup>1</sup>

There can be no manner of doubt that our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have been made to them for good and valid reasons. Article 45, no doubt, requires the State to provide for free and compulsory education for all children, but there is nothing to prevent the State from discharging that solemn obligation through Government and aided schools and Article 45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own<sup>2</sup>.

1. In re Kerala Education Bill, 1957. 1958 SC 984-5

2. Ibid.



## Protection of certain rights regarding freedom of speech, etc.

### SYNOPSIS

- 23.1. Articles 19 (1) (a) (b) (c) (d) (e) (g).
- 23.2. Article 19 in relation to other Articles in Part III.
- 23.3. Six Freedom not absolute.
- 23.4. Restrictions---Reasonable tests.
- 23.5. Article 19 (2)---Restriction on Freedom of speech.
- 23.6. Restriction before Constitutional Amendment.
- 23.7. Balancing of Interest.
- 23.8. Freedom of speech under the American Constitution.

#### 23.1. *Article 19 (1) (a), (b), (c), (d), (e) and (g).*

**19. Protection of certain rights regarding freedom of speech etc.—(1)** All citizens shall have the right—

- (a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions ;
- (d) to move freely throughout the territory of India ;
- (e) to reside and settle in any part of the territory of India ;
- (g) to practice any profession, or to carry on any occupation, trade or business.<sup>1</sup>

#### 23.2. *Article 19 in relation to other Articles in Part III.*

In *A. K. Gopalan v. State of Madras*,<sup>2</sup> all the six learned Judges constituting the Bench held that punitive detention or imprisonment awarded as

1. *Constitution of India*, Art. 19 (1).

2. (1950), 1 SCR 88.

punishment after conviction for an offence under the Indian Penal Code was outside the scope of Article 19, although this conclusion was reached by them by adopting more or less different approaches to the problem.

It was contended on behalf of *A. K. Gopalan* that since the preventive detention order resulted in the detention of the detenu in a cell, his rights specified in clauses (a) to (e) and (g) of Article 19 (1) had been infringed.

Kania, C. J., rejected this argument, *inter alia*, on these grounds (1) Argument would have been equally applicable to case of punitive detention, and its acceptance would lead to absurd results. In spite of saving clauses (2) to (6), permitting abridgement of the rights connected with each other, punitive detention under several sections of the Penal Code, e. g. for theft, cheating, forgery and even ordinary assault, will be illegal, (*because the reasonable restrictions in the interest of "public order" mentioned in clauses (2) to (4) of the Article would not cover these offences and many other crimes under the Penal Code which injure specific individuals and do not affect the community or the public at large*). Unless such conclusion necessarily follows from the article it is obvious that such construction should be avoided. Such result is clearly not the outcome of the Constitution.

(ii) Judged by the test of direct and indirect effect on the rights referred to in Article 19 (1), the Penal Code was not a law imposing restrictions on these rights. The test is that "the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life.

(iii) The contents and subject-matter of Articles 19 and 21 are thus not the same. Article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. Article 19 (1) does not purport to cover all aspects of liberty or of personal liberty. Personal liberty would primarily mean liberty of the physical body. The rights given under Article 19 (1) do not directly come under that description. In that Article only certain phases of liberty are dealt with. Article 19 should be read as a separate complete Article.

Patanjali Sastri, J., also opined that lawful deprivation of personal liberty on conviction and sentence for committing a crime, or by a lawful order of preventive detention is "not within the purview of Article 19, at all, but is dealt with by the succeeding Articles 20 and 21". In tune with Kania, C. J., the learned Judge observed : "A construction which would bring within Article 19 imprisonment in punishment of a crime committed or in prevention of a crime threatened would, as it seems to me, make a reduction ad absurdum of that provision. If imprisonment were to be regarded as a 'restriction' of the right mentioned in Article 19 (1) (d), it would equally be restriction on the rights

mentioned by the other sub-clauses of Clause (1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to run the gauntlet of Clauses (2) to (6) before their validity could be accepted. For instance, the law which imprisons for theft would on that view, fall to be justified under Clause (2) as a law sanctioning restriction of freedom of speech and expression.

Article 19 confers the rights therein specified only on the citizen of India, while Article 21 extends the protection of life and personal liberty to all persons citizens and non-citizens alike. Thus, the two Articles do not operate in a conterminous field.

Personal liberty was used in Article 21 in a sense which excludes the freedoms dealt in Article 19.

Mahajan, J., adopted a different approach. In his judgment, "an examination of the provisions of Article 22 clearly suggests that the intention was to make it self-contained as regards the law of preventive detention and that the validity of a law on the subject to preventive detention cannot be examined or controlled either by the provisions of Article 21 or by the provision of Article 19 (5)."

Mukerjee, J. explained the relative scope of the Articles in this group thus : "To me it seems that Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints may be placed upon them by law so that they may not conflict with public welfare or general morality. On the other hand, Articles 20, 21 and 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interest of the society and they set down the limits within which the State control should be exercised. In my opinion, the group of Articles 20 to 22 embody the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as well as to procedural law".

The only proper way of avoiding these anomalies is to interpret the two provisions (Articles 19 and 21) as applying to different subjects. It is also unnecessary to enter into a discussion on the question.....as to whether Article 22 by itself is a self-contained Code with regard to the law of Preventive Detention.

S. R. Das, J.<sup>1</sup>, also rejected the argument that the whole of the Indian Penal Code is a law imposing reasonable restrictions on the rights conferred by Article 19 (1), with these observations :

"To say that every crime undermines the security of the State and, therefore, every section of the Indian Penal Code, irrespective of whether it has any reference to speech or expression, is a law within the meaning of this clause is wholly unconvincing and betrays only a vain and forlorn attempt to find an explanation for meeting the argument that any conviction by a Court of law must necessarily infringe Article 19 (1) (a). There can be no getting away from the fact that a detention as a result of conviction impairs the freedom of speech far beyond what is permissible under Clause (2) of Article 19. Likewise, a detention on lawful conviction impairs each of the other personal rights men-

1. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (257) : *Bachan Singh v. State of Punjab*, 1980 SC 898 (909).

tioned in sub-clauses (3) to (6). The argument that every section of Indian Penal Code irrespective of whether it has any reference to any of the rights referred to in sub-clauses (b) to (c) and (g) is a law imposing reasonable restriction on those several rights has not even the merit of plausibility. There can be no doubt that a detention as a result of lawful conviction must necessarily impair the fundamental personal right guaranteed by Article 19 (1) far beyond what is permissible under Clauses (2) to (6) of that article and yet nobody can think of questioning the validity of the detention or of the section of the Indian Penal Code under which the sentence was passed".

Das, J., then gave an additional reason as to why validity of punitive detention or of the sections of the Penal Code under which the sentence was passed, cannot be challenged on the ground of Articles 19, thus : "Because the freedom of his person having been lawfully taken away, the convict ceases to be entitled to exercise any of the rights protected by clause (1) of Article 19."

The learned Judge also held that "Article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Article 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men."

Fazal Ali, J. held that since preventive detention unlike punitive detention, directly infringes the right under Article 19 (1) (d), it must pass the test of Clause (5). According to the learned Judge, only those laws are required to be tested on the anvil of Article 19 which directly restrict any of the rights guaranteed in Article 19 (1). Applying this test (of direct and indirect effect) to the provisions of Indian Penal Code, the learned Judge pointed out that the Code "does not primarily or necessarily impose restrictions on the freedom of movement, and it is not correct to say that it is a law imposing restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement. The punishment may consist in imprisonment or a pecuniary penalty. If it consists in a pecuniary penalty it obviously involves no restriction on movement but if it consists in imprisonment, there is a restriction on movement. This restraint is imposed not under a law imposing restrictions on movement but under a law defining crime and making it punishable. The punishment is correlated with the violation of some other person's right and not with the right of movement possessed by the offender himself. In my opinion, therefore, the Indian Penal Code does not come within the ambit of the words 'law imposing restriction on the right to move freely'".<sup>1</sup>

In applying the above test, which was the same as adopted by Kania, C.J., Fazal Ali, J. reached a conclusion contrary to that reached by the Chief Justice, on the following reasoning : "Punitive detention is however essentially different from preventive detention. A person is punitively detained only after trial for committing a crime and after his guilt has been established in a competent court of justice. A person so convicted can take his case to the State High Court and sometimes bring it to the Supreme Court also ; and he can in the course of the proceeding connected with his trial take all pleas available to him including the plea of want of jurisdiction of the Court of trial and the invalidity of the law under which he has been prosecuted. The final judgment in the criminal trial will thus constitute a serious obstacle in his way if he chooses to assert even after his conviction that his right under Article 19 (1) (d) has been violated. But a person who is preventively detained had not to face such an obstacle whatever other obstacle may be in his way."

1. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (145-46) ; *Bachan Singh v. State of Punjab*, 1980 SC 898 (910).

This proposition was recently reiterated in *Hardhan Shah v. State of West Bengal*.<sup>1</sup> In accord with this line of reasoning in *A. K. Gopalan's* case a Constitution Bench—the Supreme Court in *Hardhan Shah's* case restated the principle for the applicability of Article 19 by drawing a distinction between a law of preventive detention and a law providing punishment for commission of crimes, thus : “Constitution has conferred rights under Article 19 and also adopted preventive detention to prevent to greater evil of elements imperilling the security, the safety of a State and the welfare of the nation. It is not possible to think that a person who is detained will yet be free to move or assemble or form association or unions or have the right to reside in any part of India or have the freedom of speech or expression. Suppose a person is convicted an offence of cheating and prosecuted (and imprisoned) after trial, it is not open to say that the imprisonment should be tested with reference to Article 19 for its reasonableness. A law which attracts Article 19 therefore must be such as is capable of being tested to be reasonable under clauses (2) to (5) of Article 19”.<sup>2</sup>

This doctrine of exclusivity of fundamental rights was clearly and unequivocally overruled in *R. C. Cooper's* case by majority of the Full Court, Ray, J. alone dissenting and so was the ‘object and form test’ or ‘pith and substance rule’ laid down in *A. K. Gopalan's* case. Shah, J. speaking on behalf of the majority Judges said in *R. C. Cooper's* case (supra) :

“.....It is not the object of the authority making the law impairing the right of a citizen nor the form of action taken that determines the protection he can claim, it is the effect of the law and of the action upon the right which attract the jurisdiction of the court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the subject of the Legislature nor by the form of the action, but by its direct operation of the individual's rights”.

“We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme”

“In our judgment, the assumption in *A. K. Gopalan's* case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.”

This view taken in *R. C. Cooper's* case has since then been consistently followed in several decision of which to mention only a few, namely. *Shambhu Nath Sarkar v. State of West Bengal*,<sup>3</sup> *Haradhan Saha v. State of West Bengal*<sup>4</sup> *Khudiram Das v. State of West Bengal*<sup>5</sup> and *Maneka Gandhi's* case.

In *Maneka Gandhi v. Union of India*,<sup>6</sup> Bhagwati, J. explained the scope of the same test by saying that “a law or an order made thereunder will be hit by

1. (1975) 1 SCR 778 (784).

2. *Bachan Singh v. State of Punjab*, 1980 SC 908 (910).

3. (1974) 1 SCR 778 : 1974 SC 1425,

4. (1975) 1 SCR 778 : 1974 SC 2154.

5. (1974) 2 SCR 832 : 1975 SC 550.

6. (1978) 1 SCC 248.

Article 19, if the direct and inevitable consequence of such law or order is to abridge or take away any one or more of the freedoms guaranteed by Article 19 (1). If the effect and operation of the statute by itself, upon a person's fundamental rights is remote or dependent upon "factors which may or may not come into play" then such statute is not *ultra vires* on the ground of its being violative of that fundamental right. Bhagwati, J. described this proposition as "the doctrine of intended and real effect" ; while Chandrachud, J. (as he then was) called it "the test of proximate effect and operation of the statute".

The test of direct and indirect effect adopted in *A. K. Gopalan* was approved by the Full Court in *Ram Singh v. State of Delhi*.<sup>1</sup> Therein, Patanjali Sastri, J. quoted with approval the passages (i) and (ii) (which have been extracted earlier) from the judgment of Kania, C. J. Although Mahajan and Bose, JJ. differed on the merits, there was no dissent on this point among all the learned Judges.

The first decision, which though purporting to follow Kania, C. J.'s enunciation in *A. K. Gopalan's* case imperceptibly added another dimension to the test of directness, was *Express Newspapers (Private) Ltd. v. The Union of India*.<sup>2</sup> In that case, the constitutional validity of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, and the legality of the decision of the Wage Board, constituted thereunder, were challenged. The impugned Act, which had for its object the regulation of the conditions of service of working journalists and other persons employed in newspaper establishments, provided, *inter alia*, for the payment of gratuity of a working journalist who had been in continuous service for a certain period. It also regulated hours of work and leave and provided for retrenchment compensation. Section 9 (1) laid down the principle that the Wage Board was to follow in fixing the rates of wages of working journalists.

N. H. Bhagwati, J who delivered the unanimous judgment of the Constitution Bench, after noting that the object of the impugned legislation was to provide for the amelioration of the conditions of the workmen in the newspaper industry, overruled this contention of the employers thus :

"That, however would be a consequence which would be extraneous and not within the contemplation of the legislature. It could therefore, hardly be urged that the possible *effect of the impact* of these measure in conceivable cases would vitiate the legislation as such. All the consequences which have been visualized in this behalf by the petitioners, *viz.*, the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioner's freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid ; the imposition of penalty on the petitioner's right to choose the instrument for exercising the freedom or compelling them to seek alternative media, etc., *would be remote and depend upon various factors which may or may not come into play*. Unless these were the *direct or inevitable consequences* of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation".

The learned Judge further observed that the impugned Act could be "legitimately characterised as a measure which affects the press", but its "intention or the proximate effect and operation" was not such as would take

1. 1951 SCR 451.

2. 1959 SCR 12 : 1958 SC 678.

away or abridge the right of freedom of speech and expression guaranteed in Article 19 (1) (a), therefore, it could not be held invalid on that ground. The impugned decision of the Wage Board, however, was held to be *ultra vires* the Act and contrary to the principles of natural justice.

Again, in *Sakal Papers (P) Ltd. v. The Union of India*,<sup>1</sup> the Supreme Court, while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956, and Daily Newspaper (Price and Page) Order, 1960, held that the "direct and immediate" effect of the impugned Order would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it has a fundamental right under Article 19 (1) (a) and, therefore, the Order was violative of the right of the newspapers guaranteed by Article 19 (1) (a), and as such, invalid. In this case, also the emphasis had shifted from the object and subject-matter of the impugned State action to its *direct and immediate effect*.

From the above conspectus, it is clear that the test of direct and indirect effect was not scrapped. Indeed, there is no dispute that the test of 'pith and substance' of the subject-matter and of direct and of incidental effect of legislation is a very useful test to determine the question of legislative competence, *i. e.*, in ascertaining whether an Act falls under one Entry while incidentally encroaching upon another Entry. Even for determining the validity of a legislation on the ground of infringement of fundamental rights, the subject-matter and the object of the legislation are not altogether irrelevant. For instance, if the subject-matter of the legislation directly covers any of the fundamental freedoms mentioned in Article 19 (1), it must pass the test of reasonableness under the relevant head in clauses (2) to (6) of the Article. If the legislation does not directly deal with any of the rights in Article 19 (1) that may not conclude the enquiry. It will have to be ascertained further whether by its direct and immediate operation, the impugned legislation abridges any of the rights enumerated in Article 19 (1).

In *Bennett Coleman*,<sup>2</sup> Mathew, J. in his dissenting judgment referred with approval to the test as expounded in *Express Newspaper*. He further observed that "the 'pith and substance' test, though not strictly appropriate, must serve a useful purpose in the process of deciding whether the provisions in question which work some interference with the freedom of speech, are essentially regulatory in character".

From a survey of the cases noticed above, a comprehensive test which can be formulated, may be restated as under :

"Does the impugned law, in its pith and substance, whatever may be its form and object, deal with any of the fundamental rights conferred by Article 19 (1) ? If it does, does it abridge or abrogate any of those rights ? And even if it does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19 (1) is the direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights?"

The mere fact that impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid, must pass the test of reasonableness under Article 19. But

1. (1962) 3 SCR 842 : 1962 SC 305.

1. *Bennett Coleman & Co. Ltd. v. Union of India*, 1973 SC 106.

if the impact of law on any of the rights under clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependant upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity.<sup>1</sup>

### 25.3. *Six Freedoms not absolute.*

The citizens shall have the right—

- (a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions ;
- (d) to move freely through out the territory of India ;
- (e) to reside and settle in any part of the territory of India ;
- (g) to practice any profession, or to carry on any occupation, trade or business.

After Article 19 (1) had conferred on the citizen the several rights set out in its above six sub-clauses, action was at once taken by the Constitution in Clauses (2) to (6) to keep the way of social control free from any reasonable impediment.<sup>3</sup>

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making

1. *Bachan Singh v. State of Punjab*, 1980 SC 912(915).

2. *Constitution of India*, Art. 19.

3. *Narendra Kumar v. Union of India*, 1960 SC 431 (435).



any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.<sup>1</sup>

The *raison d'être* of a State being the welfare of the members of the State by suitable legislation and appropriate administration, the whole purpose of the creation of the State would be frustrated if the conferment of these rights would result in cessation of legislation in the extensive fields where these rights operate. But without the saving provisions that would be the exact result of Article 13 of the Constitution. It was to guard against this position that the Constitution provided in its Clauses 2 to 6 that even in the fields of these rights new laws might be made and old laws would operate where this was necessary for general welfare. Laws imposing reasonable restriction on the exercise of the rights are saved by Clause 2 in respect of rights under sub-clause (a) where the restrictions are "in the interests of the security of the State"; and of other matters mentioned therein; by Clause 3 in respect of the rights conferred by sub-clause (b) where the restrictions are "in the interests of public order;" by Clauses 4, 5 and 6 in respect of the rights conferred by sub-clauses (c), (d), (e), (f) and (g) the restrictions are "in the interest of the general public" in Clause 5 which is in respect of rights conferred by sub-clauses (d), (e) and (f) also where the restrictions are "for the protection of the interests of any scheduled tribe."<sup>2</sup> But for these saving provisions such laws would have been void because of Art. 13 which is in these words:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of the Part, shall, to the extent of such inconsistency be void: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

As it was to remedy the harm that would otherwise be caused by the provisions of Article 13, that these saving provisions were made, it is proper to remember the words of Article 13 in interpreting the words "reasonable restrictions" on the exercise of the right as used in Clause (2). It is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws "inconsistent" with Article 19 (1), or "taking away the rights" conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word "restriction" to include cases of "Prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is undoubtedly correct, however, that when the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.<sup>3</sup>

1. *Constitution of India*, Art. 16 (6).

2. *Narendra Kumar v. Union of India*, 1960 SC 431 (435).

3. *Ibid.*, pp. 435-36.

### 23.4. Restrictions—Reasonable tests

History is replete with genuine accusation of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. The word “unreasonably” is a very strong word, the strength of which may easily fail to be recognized.<sup>1</sup> The question often arises whether some one has acted, is acting or is proposing to act “unreasonably” To decide this question, it must be remembered, as Lord Hailsham said : “Two reasonable persons can perfectly come reasonably to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.”<sup>2</sup> It is one thing to say to a person : “I think you are wrong, I do not agree with you”. It is quite another thing to say to him, “you are quite unreasonable about it.” It is common place in argument to say to your adversary: “You are being very unreasonable” when all you mean is “I think you are wrong.” “Such hyperbole,” said Lord Denning “is excusable in ordinary mortals but not in those who have to consider and apply Acts of Parliament. No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view All the more so when a man is entrusted by Parliament with the task of deciding whether another person has acted, is acting or is proposing to act unreasonably Especially when the one who has to decide has himself his own views—and perhaps his own strong views—as to what should or should not be done. He must be very careful then not to fall into the error, a very common error of thinking that any one with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite views can not reasonably be held by any one. But he must pause before doing so. He must ask himself : ‘Is this person so very wrong’ May he not quite reasonably take a different view? It is only when that answer is, “He is completely wrong. No reasonable person could take the view that he should condemn him as being unreasonable.”

The phrase ‘reasonable restriction’ connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word ‘reasonable’ implies intelligent care and deliberation, that is, the choice of a course which reason dictates.”<sup>3</sup>

A fairly exhaustive test to ascertain the reasonableness of a provision is given by Patanjali Sastri, C. S. in *State of Madras v. V. G. Row*.<sup>4</sup> Therein the learned Chief Justice observed thus : “It is important in this context to bear in mind that the test of reasonableness, wherever prescribed should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.”

Reasonableness of a statutory provision cannot be determined by the application of a set formula : it must be determined on a review of the procedural and substantive provisions of the statute keeping in mind the nature of the right intended to be infringed underlying purpose of the restriction contemplated to be imposed, gravity of the evil intended to be remedied thereby,

1. *Secretary of State v. Tameside* (1976) 3 A'l. E. R. 665 (671).

2. *Re W. (an infant)*, (1971) 2 All E. R. 49 (50); *Secretary of State Tameside*, (1973) 3 All E. R. 665 (671).

3. *Chintaman Rao v. State of M. P.*, 1951 SC 118 (119) ; *Abdul Hakim Qurashi v. State of Bihar*, 1961 SC 448 : (1961) 2 SCR 617.

4. 1952 SCR 597 (607) : 1952 SC 196 (200).

object intended to be achieved by the imposition of restriction, and other relevant circumstances.<sup>1</sup>

As observed in *Dr. Khare, N. B. v. State of Delhi*,<sup>2</sup> and reiterated in *V. G. Row's case*, (supra) it has to be held that in considering reasonableness of laws imposing restrictions on fundamental rights both substantive and procedural aspects of the law should be examined from the point of view of reasonableness and the test of reasonableness wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. It is not possible to formulate an effective test which would enable the Court to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. In other words, in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable.<sup>3</sup>

One of the important tests to find out whether a restriction is reasonable is to see whether the aggrieved party has a right of representation against restriction imposed or proposed to be imposed. No person can be deprived of his liberty without being afforded an opportunity to be heard in defence and that opportunity must be adequate, fair and reasonable. Further the Courts have to see whether the restriction is in excess of the requirement or whether it is imposed in an arbitrary manner.<sup>4</sup>

As to what are reasonable restrictions on the right conferred by Article 19 (1)(g) of the constitution would naturally depend on the nature and circumstances of the case, the character of the statute, the object which it seeks to serve, the existing circumstances, the extent of the evil sought to be remedied as also the nature of restraint or restriction placed on the rights of the citizen. It is difficult to lay down any hard and fast rule of universal application but in imposing such restrictions the State must adopt an objective standard amounting to a social control by restricting the right of the citizens where the necessities of the situation demand. The restrictions must be in public interest and are imposed by striking a just balance between the deprivation of right and the danger or evil sought to be avoided. If the restrictions imposed appear to be consistent with the directive principles of State policy they would have to be upheld as the same would be in public interest and manifestly reasonable. Further, restrictions may be partial, complete, permanent or temporary but they must bear a close nexus with the object in the interest of which they are imposed. Another important test is that restriction should not be excessive or arbitrary. The court must examine the direct and immediate impact of the restrictions on the rights of the citizens and determine if the restrictions are in larger public interest while deciding the question that they contain the quality of reasonableness.<sup>5</sup> In such cases it is important to bear in mind that the test of reasonableness wherever prescribed should be applied to each individual statute impugned, and no

1. *State of Bihar v. Misra, K. K.*, 1971 SC 1667 (1670)

2. 1950 SCR 519 : 1950 SC 211.

3. *State of Bihar v. Misra, K. K.* 1971 SC 1667 (1675).

4. *Ibid*, p. 1675.

5. *Laxmi Khandhari v. State of U. P.*, 1981 SC 873 (880).

abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.<sup>1</sup>

Restrictions may be partial, complete, permanent or temporary but they must bear a close nexus with the object in the interest of which they are imposed. Sometimes even a complete prohibition of the fundamental right to trade may be upheld if the commodity in which the trade is carried on is essential to the life of the community and the said restriction has been imposed for a limited period in order to achieve the desired goal.<sup>2</sup>

Another important consideration is that the restrictions must be in public interest and are imposed by striking a just balance between the deprivation of right and the danger or evil sought to be avoided. Thus freezing of stocks of food grains in order to secure equitable distribution and availability on fair prices have been held to be a reasonable restriction in the cases of *Narendra Kumar v. Union of India*<sup>3</sup> *Diwan Sugar & General Mills (P) Ltd. v. Union of India*,<sup>4</sup> and *State of Rajasthan v. Nath Mal and Miha Mal*.<sup>5</sup>

Another important test that has been laid down by the Supreme Court is that restrictions should not be excessive or arbitrary and the court must examine direct and immediate impact of the restrictions on the rights of the citizens and determine if the restrictions are in larger public interest while deciding question that they contain the quality of reasonableness.<sup>6</sup>

In such cases a doctrinaire approach should not be made but care should be taken to see that the real purpose which is sought to be achieved by restricting the rights of the citizens is subserved. This can be done only by examining the nature of the social control, the interest of the general public which is subserved by the restrictions, the existing circumstances which necessitated the imposition of the restrictions, the degree and urgency of the evil sought to be mitigated by the restrictions and the period during which the restrictions are to remain in force. At the same time the possibility of an alternative scheme which might have been but has not been enforced would not expose the restrictions to challenge on the ground that they are not reasonable.<sup>7</sup>

In determining the reasonableness of restrictions imposed by law in the field of industry, trade or commerce, the mere fact that some of the persons engaged in a particular trade may incur loss due to the imposition of restrictions will not render them unreasonable because it is manifest that trade and industry pass through periods of prosperity and adversity on account of economic, social or political factors. In a free economy controls have to be introduced to ensure availability of consumer goods like food-stuffs, cloth or the like at a fair price and the fixation of such a price cannot be said to be an unreasonable restriction in the circumstances.<sup>8</sup>

1. *Fatechand v. State of Maharashtra*, 1977 SC 1825 (1837).

2. *Laxmi Khandsari v. State of U. P.*, 1981 SC 873 (881), (per Fazal Ali, J).

3. (1960) 2 SCR 375 : 1960 SC 430.

4. (1959) Supp. 2 SCR 123 : 1959 SC 626.

5. 1954 SCR 982 : 1954 SC 307.

6. *Laxmi Khandsari v. State of U. P.*, 1981 SC 873 (881) (per Fazal Ali, J)

7. *Ibid.*

8. *Ibid.*

Where restrictions are imposed on an citizen carrying on a trade or commerce in an essential commodity, the aspect of controlled and fair and equitable distribution to the consumer at a reasonable price leaving an appreciable margin of profit to the producer is undoubtedly a consideration which does not make the restriction unreasonable.

In evaluating such elusive factors mentioned in *Row's* case<sup>1</sup> and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.<sup>2</sup>

The case *Laxmi Chand v. State of U. P.*<sup>3</sup> was followed in a later decision of this Court in *Mineral Development Ltd. v. State of Bihar*<sup>4</sup> where after quoting the observations of Patanjali Sastri, C. J., as extracted above, Subba Rao, J., speaking for the Court observed as follows : "These observations, lay down the correct principle. It follows that it is the duty of this Court to decide, having regard to the aforesaid considerations and such others whether a particular statute satisfies the objective test of "reasonableness".<sup>5</sup>

In the case of *the Collector of Customs, Madras v. Sampathu Chetty*<sup>6</sup> the observations of Patanjali Sastri, C. J., were endorsed by the Supreme Court when Ayyangar, J., speaking for the court, made the following observations :

The fundamental rights enshrined in Article 19 of the Constitution are not absolute and unqualified but are subject to reasonable restrictions which may be imposed under sub-clauses (2) to (6) of Article 19. Whenever a complaint of violation of fundamental rights is made the Court has to determine whether or not the restrictions imposed contain the quality of reasonableness. In assessing these factors a doctrinaire approach should not be made but the essential facts and realities of life have to be duly considered.

The principles laying down the various tests of reasonableness have been very aptly enunciated in the case of *State of Madras v. V. G. Row*<sup>8</sup> which is almost the locus classicus on the subject in question. In that case Shastri C. J., speaking for the Court observed as follows :

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion

1. 1952 SCR 597 : 1952 SC 196.

2. *Collector of Customs Madras v. Sampathu Chetty*, 1952 SC 316 : (1952) 3 SCR 597.

3. *Laxmi Khandhari v. State of U. P.*, (1981) 2 SCC .p (611-12) (Fazal Ali, J.)

4. (1960) 2 SCR 609 : 1960 SC 468.

5. *Laxmi Khandhari v. State of U. P.*, (1981) 2 SCC (612), (Fazal Ali J.).

6. (1962) 3 SCR 786 : 1962 SC 316.

7. *Siljan v. District Magistrate*, 1983 SC 1130 (1132).

8. 1952 SCR 597 ; 1952 SC 196.

of the imposition, the prevailing condition at the time should all enter into the judicial verdict.”

The principle accepted by the Supreme Court was that if a purpose was one falling within the directive principles, it would definitely be a public purpose. It may also be pointed out that in *Kasturi Lal Lakshmi Reddy v. State of J & K*,<sup>2</sup> it was held that every executive action of the government, whether in pursuance of law or otherwise, must be reasonable and informed with public interest and the yardstick for determining both reasonableness and public interest is to be found in the directive principles and if any executive action is taken by the government for giving effect to a directive principle, it would *prima facie* be reasonable and in public interest. It will, therefore, be seen and it imposes a restriction on a fundamental right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a directive principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice. The dynamic principle of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a directive principle with a view to promoting social and economic justice, it would be difficult to say that such law violates the principle of egalitarianism and is not in accord with the principle of equality before the law as understood not in its strict and formalistic sense, but in its dynamic and activist magnitude. In the circumstances, the court would not be unjustified in making the presumption that as law enacted really and genuinely for giving effect to a directive principle in furtherance of the cause of social and economic justice would not infringe any fundamental right under Article 14 or Article 19.

One of the tests laid down by the Supreme Court is that, in judging the reasonableness of the restrictions imposed by clause (5) of Article 19, the court has to bear in the mind the Directive Principles of State Policy.

So also in the *State of Bihar v. Kameshwar Singh*<sup>1</sup> this Court relied upon the directive principle contained in Article 39 in arriving at its decision that the purpose for which the Bihar Zamindari Abolition legislation had been passed was a public purpose. The principle accepted by this Court was that if a purpose is one falling within the directive principles, it would definitely be a public purpose.

### 23.5. Article 19 (2) Restriction on Freedom of speech

Article 19 (1) (a) provides that all citizens shall have right to freedom of speech and expression. This right was subject to restrictions mentioned in Clause (2) which said: “Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the state from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State.

1. 1952 SCR 889 : 1952 SC 225.

2. 1980 SC 1992.

Article 19 (2) of the Constitution has created a fence inside which every citizen has the absolute freedom of speech or expression.

The leading cases on freedom of expression are generally framed with reference to public debate and discourse. But as Chafee said, "the First Amendment and other parts of the law erect a fence inside which men can talk. The law-makers, legislators and officials stay on the outside of that fence. But what the men inside the fence say when they are let alone is no concern of the law."

The teacher<sup>1</sup> as well as the public speaker<sup>2</sup> is included. The actor on stage or screen, the artist whose creation is in oil or clay or marble, the poet whose reading public may be practically non-existent, the musician and his musical scores, the counselor whether priest, parent or teacher no matter how small his audience these too are beneficiaries of freedom of expression. The remark by President James A. Garfield that his ideal of a college was a log in the words with a student at one end and Mark Hopkins at another puts the present problem in proper First Amendment dimension. Of course a physician can talk freely and fully with his patient without threat of retaliation by the State. The contrary thought—the one endorsed subsilently by the courts below—has the cast of regimentation about it, a cast at war with the philosophy and presuppositions of this free society.<sup>3</sup>

Leveling the discourse of medical men to the morality of a particular community is a deadening influence. Mill spoke of the pressures of intolerant groups that produce "either mere conformers to commonplace, or timeservers for truth." We witness in this case a scaling of the lips of a doctor because he desires to observe the law, obnoxious as the law may be. The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude. The chronicles are filled with sad attempts of government to stomp out ideas, to ban thoughts because they are heretical or obnoxious. As Mill stated, "Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion". When that happens society suffers. Freedom working underground, freedom bootlegged around the law is freedom crippled. A society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society. Only free exchange of views and information is consistent with "a civilization of the dialogue," to borrow a phrase from Dr. Robert M. Hutchins.<sup>4</sup>

### 23.6. Restrictions before Constitutional Amendment of Clause 19 (2).

Before the Amendment of the Constitution clause 2 of Art. 19 which (omitting immaterial words regarding laws relating to libel, slander etc.) saved the operation of any existing law in so far as it related to any matter "which undetermined the security of, or tended to overthrow the State." In *Romesh Thappar v. State of Madras*<sup>5</sup> the impugned order. The Madras Maintenance of Public Order Act, 1949 was passed under the Section 100 of the Government of India Act, 1935. The Provincial Government was authorised to pass an order for the purpose of securing the public safety or the maintenance of "public order." The validity of this Order was challenged and

1. *Sweezy v. New Hampshire*, 354 US 234 : 1 L ed 2d 1311.

2. *Thomas v. Collins*, 323 US 516 : 89 L ed 430.

3. *Poe v. Ullman*, 6 L ed 2d 1002.

4. *Poe v. Ullman*, 6 L ed 2d 1003. See *Wiseman v. Ufdcroff*, 344 US 183 : 97 L ed 216 (concurring opinion).

5. 1950 SC 124.

Patanjal Sastri, J. speaking for the majority said, "unless a law restricting freedom of speech and expression was directed solely against the undermining the security of the State or the over throw of it, such law could not fall within the reservation under clause (2) of Article 19, although the restrictions which it sought to impose might have been conceived generally in the interests of public order. It followed that imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order fell outside the scope of authorised restrictions under clause (2) and was, therefore, void and unconstitutional".<sup>1</sup>

The decisions of the Supreme Court in these two cases were misapplied and misunderstood by some High Courts and had been construed as laying down the wide propositions that restrictions of the nature imposed by section 4 (1) (a) of the Indian Press (Emergency Powers) Act or of a similar character were outside the scope of Article 19 (2) of the Constitution in as much as they were conceived generally in the interests of Public Order. The deduction that a person would be free to incite to murder or other cognizable offence through the press with impunity drawn from the decision in *Romesh Thapper's case*.<sup>1</sup>

In an attempt to get over these decisions, Clause (2) of Article 19 was amended by the Constitution (First Amendment) Act, 1957. By this amendment several new grounds of restrictions upon the freedom of speech were introduced such as friendly relations with foreign states, public order and incitement to an offence.

The view that only the expression of an opinion is protected as a fundamental right, but not the inherent or intended effect on other persons, must be rejected. It is the very purpose of the expression of an opinion to produce an 'intellectual effect on the environment' to affect the entire people in a manner that shapes their opinion and is convincing.

The expression of an opinion, understood this way, is, in its purely intellectual effect, free : but invoking freedom of expression does not automatically legitimize any trespass on legally protected interest that have a higher priority. Therefore, a 'weighing of the interests' becomes necessary : The right of free expression must give way if higher ranking interests worthy of protection would be violated by the exercise of freedom of expression.

### 23.7. *Balancing Interests.*

In other Constitutions the task of balancing or weighing the interests is left to the Courts. But our Constitution has expressly laid down in Article 19 (2) various preferred subjects to which the right of free speech has been subordinated.

### 23.8. *Freedom of Speech under the American Constitution.*

In the United States there is a recurring debate in modern First Amendment Jurisprudence as to whether First Amendment rights are "absolute" in the sense that the government may not "abridge" them at all or whether the First Amendment requires the "balancing of competing interests in the sense that free speech values are the governments competing justification must be isolated and weighed in each case. The American view point was expressed by the Author in the Tagore Lectures he delivered in the Calcutta University.

Although the First Amendment to the American Constitution provides that Congress shall make no law abridging the freedom of speech, press or assembly it has long been established that those freedoms themselves are

1. *State of Bihar v. Shalaba Devi*, 1952 SC 329 (330-1) per Mahajan, J.



dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time.

Justice Holmes and Brandies took a different view. They thought that the greater danger to a democracy lay in the suppression of public discussion ; that ideas and doctrines thought harmful or dangerous were best fought with words.

In *Schenck v. United States*<sup>1</sup> the Supreme Court speaking through Holmes J. enunciated the "clear and present danger doctrine." It was said: "The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force... the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. When a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as being protected by any constitutional right."<sup>3</sup>

In *Whitney v. California*<sup>2</sup> Brandies, J. said that "no danger flowing from speech could be deemed clear and present, unless the incidence of the evil apprehended was so imminent that it might befall before there was opportunity for full discussion. If there be time to expose through discussion, the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

Frankfurter, J. added that it was far better that the phrase be abandoned than it be sounded once more to hide from the believers in an "absolute right of free speech the plain fact that the interest in speech profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself."<sup>4</sup>

In *Barenblatt v. United States*<sup>5</sup> Harlan, J. speaking for the Court said : "We conclude that the balance between the individual and the governmental interests here at stake must be struck in favour of the latter and that therefore the provisions of the First Amendment have not been offended."<sup>6</sup> Now the balancing formula is the general rule and the clear and present danger test is used as a subordinate part of that test to determine whether the evil is sufficiently serious "

The American doctrine adumbrated in *Schenck's* case cannot be imported under the Indian Constitution because the fundamental right of freedom of Speech and expression guaranteed under Art. 19 (1) of the Constitution is not an absolute right but is subject to such restrictions as may be placed by the State under clause (2) of that Article.<sup>7</sup>

1. *Abram v. United States*, 63 Led 1173 (1180).

2. *Schenck v. United States* 63 Led 470 (473-74).

3. 71 Led 1095 (1106).

4. *Dennis v. United States*, 95 Led 1137.

5. 3 Led 2nd 1115.

6. 3 Led 2nd 1115 (1133).

7. *Babulal Parate v. State of Maharashtra*, 1961 SC 884 (890).

The position in our Constitution is entirely different. The right of free speech and expression is not absolute but is subject to the restrictions mentioned in Article 19 (2).

### 23.10. American Decisions

The American judgments show the principles and policy consideration involved but may not be guide to the detailed construction of Article 19 because the First and Fourteenth Amendments have no provision corresponding to Art. 19 (2). American Judges look for the inherent limitations which there must be in the fundamental freedoms of the individual of the freedom of others and the interest of the community are not to be infringed. There are two ways of construing Art. 19 (1), one way is to read into sub-clause (1) the necessary limitations as inherent in the fundamental freedoms of expression and communications. The other way is to look first to sub-clause (1) to see whether according to the literal meaning of the words there is a *prima facie* hindering of or interference with the freedoms of expression and communication, and if there is look on to sub-section (2) to see whether such hindering or interference is justifiable.<sup>1</sup>

Under Clause (2) of Article 19, as amended, the State has a right to impose reasonable restrictions in the exercise of the right to freedom of speech and expression in the interest of (1) Sovereignty and integrity of India; (2) the security of the State; (3) friendly relations with foreign states; (4) Public order, (5) decency or morality or in relation to (6) contempt of Court; (7) defamation or (8) an incitement to an offence.

Words "Sovereignty and integrity" were added to clause (2) and clause (4) by the Constitution Sixteenth Amendment Act, 1963. Foreign State as defined in Article 267 (3) of the Constitution means any state other than India. Subject to the provisions of any law made by Parliament, the President may by order declare any state to be foreign state for such purpose as may be defined in the order.<sup>2</sup>

Supposing a lawyer or doctor, expert or exporter, missionary or guru, has to visit a foreign country professionally or on a speaking assignment. He is effectively disabled from discharging his pursuit if passport is refused. There the direct effect, the necessary consequence, the immediate impact of the embargo on grant of passport (or its subsequent impounding or revocation) is the infringement of the right to expression or profession. Such infraction is unconstitutional unless the relevant part of Article 19 (2) to (6) is complied with. In dealing with fundamental freedom substantial justification alone will bring the law under the exceptions. National security sovereignty, public order and public interest must be of such a high degree as to offer a great threat. These concept should not be devalued to suit the hyper-sensitivity of the executive or minimal threats to the State. Our nation is not so pusillanimous or precarious as to fall or founder if some miscreants pelt stones at its fair face from foreign countries. The dogs may bark, but the caravan will pass. And the danger to a party in power is not the same as rocking the security or sovereignty of the State. Sometimes, a petulant government which forces silence may act unconstitutionally to forbid criticism from afar, even if necessary for the good of the State.<sup>3</sup>

1. *Francis v. Chief of Police*, (1973) 2 All ER 251 (259).

2. *Ibid*, Proviso.

3. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 348.

## FREEDOM OF SPEECH AND EXPRESSION

## S Y N O P S I S

- 23.11. Freedom of speech.
- 23.12. Freedom of Expression.
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25.11. *Freedom of Speech.*

The leading cases on freedom of expression are generally framed with reference to public debate and discourse. But as Chafee said, "the First Amendment and other parts of the law erect a fence inside which men can talk. The law-makers, legislators and officials stay on the outside of that fence. But what the men inside the fence say when they are let alone is no concern of the law."<sup>1</sup>

The teacher<sup>2</sup> as well as the public speaker<sup>3</sup> is included. The actor on stage or screen, the artist whose creation is in oil or clay or marble, the poet whose reading public may be practically nonexistent, the musician and his musical scores, the counsellor whether priest, parent or teacher no matter how small his audience—these too are beneficiaries of freedom of expression. The remark by President James A. Garfield that his ideal of a college was a log in the woods with a student at one end and Mark Hopkins at another puts the present problem in proper First Amendment dimensions. Of course a physician can talk freely and fully with his patient without threat of retaliation by the State. The contrary thought—the one endorsed *sub silentio* by the courts below—has the cast of regimentation about it, a cast at war with the philosophy and presuppositions of this free society.<sup>4</sup>

Levelling the discourse of medical men to the morality of a particular community is a deadening influence. Mill spoke of the pressures of intolerant groups that produce "either mere conformers to commonplace, or timeservers for truth." We witness in this case a scaling of the lips of a doctor because he desires to observe the law, obnoxious as the law may be. The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into

1. *Blessings of Liberty*, (1956), p. 108.
2. *Sweezy v. New Hampshire*, 1 L ed 2d p. 1311.
3. *Thomas v. Collins*, 89 L ed p. 430.
4. *Poe v. Ullman*, 6 L ed 2nd p. 1002.

which the State may not intrude. The chronicles are filled with sad attempts of Government of stamp out ideas, to ban thoughts because they are heretical or obnoxious. As Mill stated, "Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion." When that happens society suffers. Freedom working underground, freedom bootlegged around the law is freedom crippled. A society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society. Only free exchange of views and information is consistent with "a civilization of the dialogue," to borrow a phrase from Dr. Robert M. Hutchins.<sup>1</sup>

Those who won our independence believed that the final end of the state was to make men free to develop their faculties. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They were inspired by Brandeis vision of freedom to think as you will and to speak as you think as a means indispensable to the discovery and spread of political truth and as essential both to stable government and to political change.<sup>2</sup>

### 23.12. Freedom of Expression

Freedom of expression possesses an important constitutional quality which is greatly different from any other kind of freedom. It may only be natural that people who believe in the worth and dignity of the individual should feel that material happiness is not enough, if they are deprived of intellectual or political freedom. The spirit, that freedom of expression is the most important element and is inviolate and that no individual should be deprived of the same, permeates our Constitution. What, then, is the spirit which is so important and inviolable? An individual is an august and proud thing. Every individual is capable of thinking freely of what is true, good, and beautiful in religion, morals, sciences of the world, and human existence ; or in his respective field of endeavor in society. He is capable of expressing what he thinks or understands and of learning different ideas of other persons through exchange of free speech or artistic medium. He is capable of accomplishing all these without resorting to physical force. In this way he is not only able to lead a noble life and develop his intellectual faculties, but can also give the results of his experience as an inheritance to posterity and render services to all human race. If law and Government do not exercise control over speech.....truth will finally prevail ; and it may even be possible for all varieties of flowers to bloom in profusion and bear fruits in amity. A complete unanimity of mind should be rejected. If free competition of speech or expression is repressed or controlled people's morale itself would be molded into an orthodox form and eventually become atrophied. All individuals of a nation are entitled to be informed publicly of daily happenings and the real truth. It is only when the nation hears the sincere inward feeling of the majority of people and heeds the bitter counsel or sad news of the facts that it will be possible to attain a clean politics which will meet actual circumstances and follow the people's will. Where there is not enough information, people will easily be influenced by rumors and false reports. If people are to be given only the restricted news such as those supplied by the government they will soon become deaf and blind. If the system is such that no discussion can be actively conducted, they will become mutes who will blindly follow the dictates of others. The people should also know the truth with regard to history.....

1. *Poe v. Ullman*, 6 Led 2d p. 1003 ; *Wiseman v. Updegraff*, 97 L d 216 (225).

2. *Whitney v. California*, 274 US 357 (375).

No control should be exercised to select materials present only a partial fact, omit or emphasize certain portions from the viewpoint of one ideology. At the same time.....a person has freedom not to express, not to hear, and not to see certain things That is why under our Constitution one is generally free to believe in any religion or creed, or profess any belief, even anarchism which advocates abolition of the existing Constitution, or communism, despotism, or that of inequality of man and woman. This seems to be weak point of a liberal constitution, but actually therein lies the strength of such a constitution. This is the reason why freedom is constitutionally guaranteed, and why not even the Government, the legislatures, whatever their ideology or plank may be, can deprive or restrict that freedom by legislative or administrative means.<sup>1</sup> In the event such an oppression takes place, such an act will be declared unconstitutional by the Court.

All citizens shall have the right to freedom of speech and expression so declares Article 19 (1) of the Constitution.

Freedom of speech is itself an end because the human community is in large-measure defined through speech ; freedom of speech is therefore intrinsic to individual dignity. This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect. As the US Supreme Court stated in *Cohen v. California*.<sup>2</sup> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition often wields a more effective power of suppression.<sup>3</sup>

The Constitutional guarantee of freedom of speech and expression protects social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined.<sup>4</sup> Mr. Justice Holmes gave this social value a broader and more theoretical formulation :

“Persecution of the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.....But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate

1. Decision of the German Constitution Court reported in CCL Cases, p. 515.

2. 29 L ed 2d p. 284.

3. T. Emerson : *Toward a General Theory of the First Amendment*, 9 (1966) : See also A Meiklejohn, *Free Speech and its relation to Self Government*, 1948 ed pp. 24-26.

4. Chaffe : *Free Speech in the United States*, p. 33.

good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”<sup>1</sup>

### 23.13. *Public opinion.*

Public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. This guaranteed right proceeds as a matter of course from the necessity in a democracy of a “formation of the political will of the people.” Tendencies and statements on political questions expressed in “public opinion” may be called a “preliminary formation of the political will of the people”.<sup>2</sup>

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves, and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles.<sup>3</sup>

The constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man’s mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.<sup>4</sup>

### 23.14. *Freedom of Discussion*

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. Freedom of discussion must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.<sup>1</sup>

Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the Government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy.

1. *Abrams v. United States*, 63 L ed p. 1173

2. CCL Cases p. 229.

3. *Ibid.*

4. *Ibid.*

5. *Thornhil v. Alabama*, 84 L ed p. 1093; *First National Bank of Boston v. Bellotti*, 55 L ed 2d 707 (717).

### 23.15. *Political Freedom*

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channelled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.<sup>1</sup>

For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling. Inquiry pursued in safeguarding a State's security against threatened force and violence can not be shut off by mere disclaimer, though of course a relevant claim may be made to the privilege against self-incrimination. But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.<sup>2</sup>

### 23 16. *Freedom of Press*

The "fourth estate" of the realm that was Burke's way of summing up the role of the press in his time and his phrase is no less apt today. It reminds us that the press, as the coequal of other "estates" is a political institution in its own right, intimately bound up with all the institutions of government. It affects them and is affected by them in turn, and together they determine the nature of the regime and the quality of public life. Governmental institutions have political effects through their exercise of legislative, executive, or judicial powers the press achieves its impact through the way it influences the entry of ideas, and information into the "public space" in which political life takes place."<sup>3</sup>

The emergence of Constitutional Government, and in particular the crystallization of the system of popular representation are inextricably interwoven with the growth of the modern press. Without it constitutional government is unimaginable. Thomas Jefferson dramatized this view by saying that if he were confronted with the choice of having a government and no newspapers, or newspapers and no government, he would have no hesitation in preferring the newspapers ; as an ardent believer in minimizing the role of govern-

1. *Sweezy v. New Hampshire*, 1 L ed 2d p. 1325.

2. *Ibid.* p. 1333.

3. Paul H. Weaver : *The new Journalism and the old thoughts after Watergate, the public interests spring*, 1974 p. 67.<sup>1</sup>

ment, he realised that the government could not be restrained without independent newspapers ready to criticize.<sup>1</sup>

The liberty of the Press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. The Press in its historic cannotation comprehends every sort of publication which affords a vehicle of information and opinion.<sup>2</sup>

It may not be true to say that a right which is not specially mentioned by name can never be a fundamental right within the meaning of Article 19 (1). It is possible that a right does not find express mention in any clause of Art. 19 (1) and yet it may be covered by some clause of that Article. Take for example, by way of illustration, freedom of press is the most cherished and valued freedom in a democracy; indeed democracy cannot survive without a free press. Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people, by the people, for the people it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, in the most comprehensive sense, is not possible unless there is a free and independent press. Indeed the true measure of the health and vigors of a democracy is always to be found in its press.<sup>3</sup> Look at its newspapers—do they reflect diversity of opinions and views, do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or deify the ruler. The newspapers are an index of the true character of the Government—whether it is democratic or authoritarian. It was Mr. Justice Peffer Stewart who said: “Without an informed and free press, there can not be an enlightened people.” Thus freedom of the press constitutes one of the pillars of democracy and indeed lies at the foundation of democratic organisation and yet it is not enumerated in so many terms as a fundamental right in Article 19 (1) 4. It has been held by the Supreme Court in several decisions, of which we may mention only a few, namely, *Express Newspapers’ case*,<sup>4</sup> *Sakal Newspapers’ case* and<sup>5</sup> *Bennett Coleman & Co’s case*,<sup>6</sup> that freedom of the press is part of the right of free speech and expression and is covered by Article 19 (1) (a). The reason is that freedom of the press is nothing but an aspect of freedom of speech and expression. It partakes of the same basic nature and character and is indeed an integral part of free speech and expression and perhaps it would not be incorrect to say that it is the same right applicable in relation to the press.

Since the very object of the impugned law is to affect the circulation of certain newspapers which are said to be practising unfair competition it is difficult to appreciate how it could be sustained. The right to freedom of speech and expression is an individual right guaranteed to every citizen by Article 19 (1) (a) of the Constitution. There is nothing in clause (2) of Article 19 which permits the State to abridge this right on the ground of conferring benefits upon the public. It is not open to the State to curtail or infringe the

1. Fredrich : *Constitutional Government and Democracy*, p. 512.

2. *Lovell v. Griffen*, 82 L ed p. 949 (954).

3. *Maneka Gandhi v. Union of India*, 1978 SC 640.

4. 1958 SC 578.

5. 1962 SC 305.

6. 1973 SC 106.



freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19. It is admitted that the impugned provisions cannot be justified on the grounds referred to in the aforesaid clause 19 (2).<sup>1</sup> It cannot be gainsaid that the impugned order seeks to place a restraint on the latter aspect of the right by prescribing a price page schedule. We may add that the fixation of a minimum price for the number of pages which a newspaper is entitled to publish is obviously not for ensuring a reasonable price to the buyers of newspapers but for expressly cutting down the volume of circulation of some newspapers by making the price so unattractively high for a class of its readers as is likely to deter it from purchasing such newspapers.<sup>2</sup>

### 23.17. Newspapers

Newspapers reflect diversity of opinion and view. They contain expression of dissent and criticism against Government policies and action. They do not obsequiously sing the praises of the government or lionize or deify the ruler. The newspapers are index of the true character of the Government whether it is democratic authoritarian.<sup>3</sup>

The freedom of a newspaper to publish a number of pages or to circulate it to any number of persons is each an integral part of the freedom of the press, and any restraint placed upon either of them would be a direct infringement of the right of freedom of speech and expression. It would not be legitimate to subject the press to laws which take away or abridge the freedom of speech and expression or which are calculated or intended to curtail circulation and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising its rights.<sup>4</sup>

The Newspaper (Price and Page) Act, 1956 empowered the Central Government to regulate the prices of newspapers in relation to their pages and sizes if it was of the opinion that it was necessary to do so for the purpose of preventing unfair competition among newspapers. The Central Government made the Daily Newspapers (Price and Page) Order, 1960 under which the right of newspaper to publish news and views and to utilize as many pages as it liked for that purpose was made to depend upon the price charged to the readers. The Supreme Court striking down the Act held that the object of the law was to affect directly the right of circulation of newspapers which would necessarily undermine their power to influence public opinion, it could not but be regarded as a dangerous weapon which was capable of being used against democracy itself.<sup>5</sup>

In *Virendra v. State of Punjab*,<sup>6</sup> the Court observed that "it was certainly a serious encroachment on the valuable and cherished right of freedom of speech and expression if a newspaper was prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day."

### 23.18. Freedom of Speech not confined to the territory of India

Article 19 (1) (a) guarantees to India citizens the right to freedom of speech and expression. It does not delimit that right in any manner and there is no reason, arising either out of interpretational dogmas or pragmatic considerations, why the courts should strain the language of the Article to cut down the amplitude of that right. The plain meaning of the clause guaranteeing

1. *Sakal Papers (P.) Ltd. v. Union of India*, 1962 SC 305 (313).

2. *Ibid.* p. 310.

3. *Maneka Gandhi v. Union of India*, 1978 SC : (1978) 1 SCC 248 (306).

4. *Ibid.*, p. 314.

5. *Ibid.* p. 315.

6. 1957 SC 896 : 1958 SCR 308.

free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose, regardless of geographical considerations, subject of course to the operation of any existing law or the power of the State to make a law imposing reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, as provided in Art. 19 (2).<sup>1</sup>

The first question that arose for consideration in *Maneka Gandhi v. Union of India*<sup>2</sup> was about the scope and ambit of the right of free speech and expression conferred under Article 19 (1) (a). Did it have any geographical limitation? Is its exercise guaranteed only within the territory of India or does it also extend outside? The Union of India contended that it was a basic postulate of the Constitution that the fundamental rights guaranteed by it were available only within the territory of India, for it could never have been the intention of the Constitution makers to confer rights which the authority of the State could not enforce. How could the fundamental rights be intended to be operative outside the territory of India when their exercise in foreign territory could not be protected by the State?

Freedom of speech and expression carries with it the right to gather information as also to speak and express oneself at home and abroad and to exchange thought and ideas with others not only in India but also outside. On what principle of construction and for what reason can this freedom be confined geographically within the limits of India? The Constitution-makers have not chosen to limit the extent of this freedom by adding the words "in the territory of India" at the end of Article 19 (1) (a). They have deliberately refrained from using any words of limitation. Then, are we going to supply these words and narrow down the scope and ambit of a highly cherished fundamental right? Only a short while before the Constitution was brought into force and whilst constitutional debate was still going on, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December, 1948, and most of the fundamental rights which we find included in Part III were recognised and adopted by the United Nations as the inalienable rights of a man in the Universal Declaration of Human Rights. Article 13 of the Universal Declaration declared that "every one has a right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and import information and ideas through any media and regardless of frontiers."<sup>3</sup>

The Supreme Court held that the freedom of speech and expression guaranteed by Article 19 (1) (a) was exercisable not only in India but also outside.

Bhagwati, J., in support of this decision said : "It is true that the right of free speech and expression enshrined in Article 19 (1) (a) can be enforced only if it is sought to be violated by any action of the State and since State action cannot have any extra-territorial operation, except perhaps incidentally in case of Parliamentary legislation, it is only violation within the territory of India that can be complained of by an aggrieved person. But that does not mean that the right of free speech and expression is exercisable only in India and not outside. State action taken within the territory of India can prevent or restrict exercise of freedom of speech and expression outside India. What

1. *Maneka Gandhi v. Union of India*, 1978 SC 597 (615).

2. 1978 SC 597 (639).

3. *Ibid.*-p. 637.

Article 19 (1) (a) does is to declare freedom of speech and expression as a fundamental right and to protect it against State action. The State cannot by any legislative or executive action interfere with the exercise of this right, except in so far as permissible under Article 19 (2). The State action would necessarily be taken in India but it may impair or restrict the exercise of this right elsewhere. Take for example a case where a journalist is prevented by a law or an executive order from sending his despatch abroad. The law or the executive order would operate on the journalist in India but what it would prevent him from doing is to exercise his freedom of speech and expression abroad. Today in the modern world with vastly developed science and technology and highly improved and sophisticated means of communication, a person may be able to exercise freedom of speech and expression abroad by doing something within the country and if this is prohibited or restricted, his freedom of speech and expression would certainly be impaired and Article 19 (1) (a) violated. Therefore, merely because State action is restricted to the territory of India, it does not necessarily follow that the right of free speech and expression is also limited in its operation to the territory of India and does not extend outside.<sup>1</sup>

### 23.19 Abuse of Freedom of Press

A publication in print has a more lasting and wide spread effect than other forms of communication. The Parliament enacted "The Press (Objectionable Matter) Act, 1951, to penalise the abuse of the freedom of the press by publication of Matter involving encouragement of violence or sabotage or incitement to certain other very grave offences. In the hope that the Press would evolve its own control Government allowed the Press (Objectionable Matter) Act, 1951 to expire on the 1st February, 1956. In view of the need for urgent action in the matter the President promulgated on the 8th December 1975, the Prevention of Publication of Objectionable Matter Ordinance, 1975 which later became the Prevention of Publication of Objectionable Matter Act, 1976.

Under Section 3 of this Act the expression "objectionable matter" was defined to mean any words, sign, or visible representations

(a) which are likely to—

(i) bring into hatred or contempt, or excite disaffection towards the Government established by law in India or in any State thereof and thereby cause or tend to cause public disorder ; or

(ii) incite any person to interfere with the production, supply or distribution of food or other essential commodities or with essential services ; or

(iii) seduce any member of the Armed Forces or the Forces charged with the maintenance of public order from his allegiance or his duty or prejudice the recruiting of persons to serve in any such Force or prejudice the discipline of any such Force ; or

(iv) promote disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities ; or

(v) cause fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility ; or

1. *Maneka Gandhi v. Union of India*, 1978 SC 597 (637).

(vi) incite any person or any class or community of persons to commit murder, mischief or any other offence ; or

(b) which—

(i) are defamatory of the President of India, the Vice-President of India, the Prime Minister or the Speaker of the House of the People or the Governor of a State ; or

(ii) are grossly indecent, or are scurrilous or obscene or intended for blackmail.

*Explanation I.*—Comments expressing disapprobation or criticism of any law or of any policy or administrative action of the Government with a view to obtain its alteration or redress by lawful means, and words pointing out, with a view to their removal by lawful means, matter which are producing, or have a tendency to produce disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall not be deemed to be objectionable matter within the meaning of this section.

*Explanation II.*—In considering whether any matter is objectionable matter under this Act, the effect of the words, signs or visible representations, and not the intention of the keeper of the press or the publisher or editor of the newspaper or news-sheet, as the case may be, shall be taken into account.<sup>1</sup>

### 23.20. *Expression by Artists*

The essential characteristic of artistic activity is free creative shaping in which the artist's impressions and experiences are given immediate expression through a specific form of language.

The essence and purpose of the fundamental right of freedom of speech and expression under Article 5 of the Basic rights of the German Constitution corresponding to Article 19 (1)(a) are to keep processes, modes of behaviour, and decisions based on the inherent laws of art and determined by aesthetic considerations independent of limits set by public authorities. The manner in which an artist encounters reality and describes events that he experiences in this encounter cannot be prescribed for him if the process of artistic creation is to develop freely. Only the artist himself can decide the 'rightness' of his attitude toward reality. In this respect, the guarantee of artistic freedom constitutes a prohibition against influencing methods, contents and tendencies of artistic activity and, in particular, against restricting the sphere of artistic creativity or prescribing generally binding rules for this creative process. For the epic work of art, the constitutional guarantee includes free choice of a subject and free shaping of that subject.

Article 5, paragraph-3, Section 1, of the Basic Law in German Constitution comprehensively guarantees freedom of artistic activity. As far as public media are necessary to establish relations between the artist and the public, the guarantee of artistic freedom therefore also protects persons who exercise such an intermediary function. The publisher of a novel, can rely on the basic right under Article 5.

The Constitutional Court held that Article 5 guaranteed autonomy of the arts without reservation. Attempts to restrict that guarantee by limiting the concept of art, by extending interpretations, or by analogy to clauses

1. Lucknow Law Times, 19/6, p. 149.

2. CCL Cases, p. 539-40. Decision of the German Constitutional Cases

restricting other constitutional provisions, so would all fail because of Article 5's clear instructions.

On the other hand, the right of artistic liberty is not unlimited. Like all basic rights the guarantee of liberty in Article 5, para 3, section 1, is based on the Basic Law's image of man as an autonomous person who develops freely within the social community. But the unconditional nature of basic rights means that limits on artistic freedom can be determined only by the Constitution itself. Since freedom of the arts does not contain any reservation for the legislator, it cannot be restricted by the general legal system or by an indefinite clause which endangers values necessary for the existence of a national community. A conflict respecting artistic freedom must rather be solved by interpreting the Constitution according to the value order established in the Basic Law and the unity of its fundamental system of values. Freedom of the arts is closely related to the dignity of man guaranteed in Article 1, which as the supreme value, governs the entire value system of the Basic Law. But the guarantee of freedom of the arts can conflict with that latter constitutionally protected sphere since a work of art also produces social effects. Because a work of art acts not only as an aesthetic reality, but also exists in the social world, an artist's use of personal data about people in his environment can affect their social rights to respect and esteem..."<sup>1</sup>

The solution to the conflict between protection of one's personality and the right to artistic freedom must therefore not only refer to the effects of a work of art in the extra-artistic social sphere, but must also take art-specific aspects into account. The individual's social right to respect and esteem is just as little superior to the freedom of the arts as the arts can summarily override man's general right to respect.

The decision whether an artistic presentation's utilization of personal data threatens such a grave encroachment upon the protected private sphere of the described person that it could preclude publication of the work of art can only be made after carefully weighing all facts of individual cases. It must be taken into account whether and to what extent the 'image', because of the artistic shaping of the material and its incorporation into and subordination to the overall organism of the work of art, appears as to independent from the 'original' that the individual, personal intimate aspects have been rendered objective in favour of the general, symbolic character of the 'figure'. If such a study...reveals that the artist has given or even wanted to give 'portrait' of the 'original', then the answer depends on the extent of artistic abstraction or the extent and importance of the 'falsification' of the reputation or memory of the person concerned."<sup>2</sup> Under the Indian Constitution this right is subject to the restrictions contained in Article 19 (2).

Right to paint or sing or dance or to write poetry or literature is also covered by Article 19 (1) because the common basic characteristic in all these activities in freedom of speech and expression or to put it differently, each of these activities is an exercise of freedom of speech and expression.<sup>3</sup>

### 23.21. Academic Freedom—Freedom in Universities

Academic freedom is the freedom claimed by a College or University professor to write or speak the truth as he sees it, without fear of dismissal by his academic superiors or by authorities outside his college or University. This

1. CCL Cases, p. 539-40. Decision of the German Constitutional cases.

2. *Ibid.*, p. 540.

3. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (306) : 1978 SC 597.

idea of academic freedom is an off-shoot of the root idea of freedom of thought. Thinking arises as a questioning of accepted beliefs and ways of acting ; and it is thus always a potential enemy of rejecting ideas; but the consciousness of the need for intellectual freedom does not arise until the thinker encounters opposition from religion, tradition or political authority. Out of these religious and political conflicts, the idea of academic freedom was born.<sup>1</sup>

When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.<sup>2</sup>

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good, if understanding be an essential need of society-inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reason that are exigent and obviously compelling.<sup>3</sup>

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicions and distrust. Teachers and students must always remain free to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>4</sup>

### 23.22. Freedom of Circulation

The right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under clause (2) of Article 19. Freedom of circulation is necessarily involved in freedom of speech and expression and is part of it and hence enjoys the protection of Article 19 (1) (a).<sup>5</sup> The Supreme Court has recognized this in *Romesh Thapar v. State of Madras*,<sup>6</sup> There, the Court held that freedom of speech and expression includes freedom

1. Encyclopedia of Social Science.

2. *Sweezy v. New Hampshire*, 1 L ed 2d p. 1331.

3. *Ibid.*

4. *Ibid.* p. 1324.

5. *Maneka Gandhi v. Union of India*, 1978., 1 SCC 248 (306).

6. *Romesh Thaper v. State of Madras*. 1950 SC 124 (127).

of propagation of ideas and that this freedom was ensured by the freedom of circulation. In that case the Court also pointed out that freedom of speech and expression were the foundation of all democratic organisations and were essential for the proper functioning of the processes of democracy.

The object of the Act in regulating the space for advertisements is stated to be to prevent 'unfair' competition. It is thus directed against circulation of a newspaper. When a law is intended to bring about this result there would be a direct interference with the right of freedom of speech and expression guaranteed under Article 19 (1) (a).

Freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. "Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value."<sup>1</sup>

### 23 23 *Commercial Speech—Advertisements.*

An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19 (1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas-social political or economic or furtherance of literature or human thought.<sup>2</sup> In *Hamdard Dawakhana v. Union of India*,<sup>3</sup> the advertisement was commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business and it is used for the purpose of furthering the business of the advertiser and has no relationship with what may be called the essential concept of the freedom of speech.<sup>4</sup>

It cannot be said that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Article 19 (1) it seeks to further. The advertisements in the case of *Hamdard Dawakhana v. Union of India*,<sup>5</sup> related to commerce of trade and not to propagating of ideas; and advertising of prohibited drugs or commodities of which the sale was not in the interest of the general public could not be speech within the meaning of freedom of speech and would not fall within Article 19 (1) (a). The main purpose and true intent and aim, object and scope of the Drugs and Magic Remedies (Objectionable Advertisement) Act 1954, was to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines had been prohibited can it be said that this is an abridgement of the petitioner's right of free speech. The Supreme Court said it is not.<sup>6</sup>

Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to "impart and acquire information about that common interest." If any limitation is placed which results in the society being deprived

1. *In re Orlunds Jackson*, 24 L ed 877 (879) : *Lovell v. Griffen*, 82 L ed 444.

2. *Hamdard Dawakhana v. Union of India*, 1960 SC 554.

3. 1960 SC 554.

4. *Ibid.*

5. *Ibid.*

6. *Ibid.*

of such right then no doubt it would fall within the guaranteed freedom under Article 19 (1) (a). But if all it does is that it deprives a trader from commending his wares it would not fall within that term.<sup>1</sup> In *John W. Rast v. Van Deman and Lewis Company*.<sup>2</sup> Mr. Justice Mckenna dealing with advertisements said :—

“Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold constitutes the only inducement to its purchase.” Advertisement takes the same attributes as the object it seeks to promote or bring to the notice of the public to be used by it. Examples can be multiplied which would show that advertisement dealing with trade and business has relation with the item “business or trade” and not with “freedom of speech”.

In *Hamdard Dawakh na's case*<sup>3</sup> it was held that the advertisements affected by the Act did not fall within Article 19 (1) (a) ; the scope and object of the Act its true nature and character was not interference with the right of freedom of speech but it dealt with trade or business ; and there was no direct abridgement of the right of free speech and mere incidental interference with such right would not alter the character of the law.<sup>3</sup>

## FREEDOM NOT ABSOLUTE

- 23.24. Freedom not absolute.
- 23.25. Sedition.
- 23.26. Public order.
- 23.27. Loudspeaker.
- 23.28. Freedom of speech and morality.
- 23.29 Indecency.
- 23.30. Obscenity.
- 23.31. Movies.
- 23 32. Defamation Libel.
- 23.33. Contempt of Court.
- 23.34. Incitement of offence.

### 23.24. Freedom not absolute.

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.<sup>3</sup>

1. *Hamdard Dawakhann v. Union of India*, 1960 SC 554 (564).
2. 60 L ed 679.
3. 1960 SC 554.
4. *Ibid.*
5. Constitution of India. Art. 19 (2).



23 25. *Sedition—Art. 19 (1) (a)*

Stephen pointed out that the view which the law takes of the offence of publishing seditious writings or uttering seditious words, will depend upon the view held as to the relation of rulers to their subjects. Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as superior to the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority. If, on the other hand, the ruler is regarded as the agent and servant, and the subject as the wise and good master, who is obliged to delegate his power to the so-called ruler, because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with a servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place or perhaps the arrangement of the household will be modified. To those who hold this view fully, and carry it out to all its consequences, there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb or property, and there may be incitements to such offences. But no imaginable censure of the government, short of a censure, which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.<sup>1</sup> The first of these two views was the accepted view in the Seventeenth Century. The second was gathering strength during the latter part of the Eighteenth Century, and is now the accepted view.<sup>2</sup>

Sedition is a crime against society. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and the laws of the country. The objects of sedition generally are to induce discontent and insurrection and stir up opposition to the government.<sup>3</sup>

The law relating to sedition in India is contained in the Indian Penal Code. Section 124A enacts that : "Whoever by words, either spoken or intended to be read, or by signs or by visible representation, or otherwise excites or attempts to excite, feelings of disaffection to the Government established by law in India" commits an offence of sedition.

The first case that arose under this section of the Indian Penal Code is the *Bangobasi*<sup>4</sup> case and Petheram, C.J. charging the Jury said : "Disaffection means a feeling contrary to affection, in other words dislike or hatred. Disapprobation simply means disapproval. It is sufficient for the purpose of this section that the words used are calculated to excite feelings of ill-will against

1. Stephens : *History of Criminal Law*, Vol. 2, p. 299-300. ; Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 237.

2. Holdsworth : *History of English Law*, Vol. 8, p. 338.

3. *R. v. Sullivan*, 11 Cox. Criminal Cases 44 (45).

4. *Queen v. Jogendra Chandra Bose*, ILR 19C 35(44).

the Government and to hold it up to the hatred and contempt of the people and that they were used with the intention to create such feeling. In *Queen Empress v. Bal Gangadhar Tilak*<sup>1</sup>, Strachey J. in the course of his charge to the Jury said "Disaffection means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. "Disloyalty" is perhaps the best general term comprehending every possible form of bad feeling to the Government. It is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication. The offence consists in exciting or attempting to excite in others bad feelings towards the Government."

This view of the law was followed in subsequent cases till the matter was examined by the Federal Court in *Niharendu v. Emperor*.<sup>2</sup> In this case Gwyer, C. J. said, "The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of Government that in our opinion the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."

This statement of the law was not approved by the Privy Council in *Emperor v. Sada Shiva*<sup>3</sup> and their Lordships held that the expression "excite disaffection" in section 124-A, Penal Code did not include "excite disorder" and incitement to violence or disorder was not a necessary ingredient of the crime of sedition as defined in law.

In *Kedar Nath Singh v. State of Bihar*,<sup>4</sup> the Supreme Court was called upon to decide the controversy whether sections 124A and 505 of the Indian Penal Code had become void in view of the provisions of Article 19 (1) (a) of the Constitution which guaranteed to every citizen the freedom of speech and expression.

The Supreme Court accepted the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder. "If it was held", said Sinha, C. J. "that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feeling of enmity against the Government,

1. ILR 22 B. 112 (134).

2. 1942 FCR 38 : 1942 FC 22 (26).

3. 74 IA 89 : 1947 PC 82.

4. 1962 SC 955.

the offence of sedition was complete then such an interpretation would make the enactment unconstitutional in view of Article 19 (1) (a) read with clause (2) of the Constitution.”<sup>1</sup>

Criticism of public measures or comment on Government action however strongly worded would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order.

“The only way to keep men from agitating against grievances is to remove the grievances. An unwillingness even to discuss these matters produces only dissatisfaction and gives comfort to the extreme elements in our country which endeavour to stir up disturbances in order to provoke Governments to embark upon a course of retaliation and repression. The seed of revolution is repression. To quote from an extra-judicial decision of Justice Holmes : “with effervescing opinion, as with the not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to the air. The worse the grievance, the more likely the victim is to get angry and urge violent measures. Reformers who get excited are pretty sure to take the position that force is justifiable, if peaceful methods fail to gain what they consider right”.

“The time is long past when the mere criticism of Government is sufficient to constitute sedition, for it is recognised that the right to utter honest and reasonable criticism is a source of strength to a community rather than a weakness. Criticism of Government is not excluded, nor even the expression of a desire for a different system altogether.”

The perspective of free criticism with its limits for free people everywhere, all true patriots will concur, is eloquently spelt out by Sir Winston Churchill on the historic censure motion in the Commons as Britain was reeling under defeat at the hands of Hitlerite hordes :

“This long debate has now reached its final stage. What a remarkable example it has been of the unbridled freedom of our Parliamentary institutions in time of war. Everything that could be thought of or rakes up has been used to weaken confidence in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the army distrust the backing it is getting from the civil power, to make workmen lose confidence in the weapons they are striving so hard to make, to present the Government as a set of non-entities over whom the Prime Minister towers, and then to undermine him in his own heart, and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes. I am in favour of this freedom, which no other country would use, or dare to use, in times of mortal peril such as those through which we are passing”.<sup>2</sup>

### 23.26. Public Order.

The expressions “law and order”, “public order” and “security of the State” are distinct concepts though not always separate. Whereas every breach

1. *Kedar Nath v. State of Bihar*, 1962 SC 955 (1969).

2. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (48-49) : 1978 SC. 597.

of peace may amount to disturbance of law and order, every such breach may not amount to disturbance of public order and every public disorder may not prejudicially affect the "security of the State."<sup>1</sup> This is borne out from the observations made by Patanjali Sastri, J in *Romesh Thapar v. State of Madras*.<sup>2</sup>

Stephen in his *Criminal Law of England* observes : "Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other and are not capable of being marked off by perfectly defined boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it". Though all these offences thus involve disturbances of public tranquillity and are in theory offences against public order, the differences between them being only a difference of degree yet for the purpose of grading the punishment to be inflicted in respect of them they may be classified into different minor categories as has been done by the Indian Penal Code. Similarly, the Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Article 19 (1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or over-throwing it, and made their prevention the sole justification for legislative abridgment of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression, while the right of peaceable assembly "sub-clause (b)" and the right of association "sub-clause (c)" may be restricted under clauses (3) and (4) of Article 19 in the interest of "public order" which in those clauses includes the security of the State. The differentiation is also noticeable in Entry 3 of List III (Concurrent List) of the Seventh Schedule, which refers to the "security of a State" and "maintenance of public order" as distinct subject of legislation. The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."<sup>3</sup>

As observed by Hidayatullah, J. in *Dr. Ram Manohar Lohia v. State of Bihar*,<sup>4</sup> one has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. 'Law and order' represents the largest circle within which is the next circle representing "public order" and the smallest circle represents "security of State". It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of State. In *G. M. Shah v. State of J. K.*<sup>5</sup> the detaining authority placed reliance on both the basis viz acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the detaining authority was satisfied that the person against whom the order was made was acting in

1. *Shah, GM v. State of J. K.*, (1980) 1 SCC 132 (137) : 1980 SC 594.

2. 1950 SCR 594 (600) : 1950 SC 124.

3. *Romesh Thapar v. State of Madras*, (1950) SCR 594 (600) : 1950 SC 124 ; *G. M. Shah v. State of J. and K.*, (1980) 1 SCC 132 : (1966) 1 SCR 709 : 1966 SC 740.

4. 1966 SCR 709 : 1966 SC 740.

5. (1980) 1 SCC 132 : 1980 SC 494.

any manner prejudicial to the security to the State or on the basis that he was satisfied that such person was acting in any manner prejudicial to the maintenance of public order. The impugned order was attempted to be supported by placing reliance on both the bases in the grounds furnished to the detenu was held to be illegal.<sup>1</sup> The Supreme Court took the same view in *Bhupal Chandra Ghosh v. Arif Ali* and *Satyabrata v. Arif Ali*.<sup>2</sup>

Under Art. 19 (2) this wide concept of "public order" is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. "Public order" is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that "public order" is synonymous with public peace, safety and tranquillity.<sup>4</sup>

The words "public order" were understood in America and England as offences against public safety or public peace. The Supreme Court of America observed in *Cantwell v. Connecticut*<sup>5</sup> thus :

"The offence known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot.....When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears the power of the State to prevent or punish is obvious".

The American decisions sanction a variety of restrictions on the freedom of speech in the interest of public order. They covered the entire gamut of restrictions that could be imposed under different heads in Art. 19 (2) of our Constitution.<sup>6</sup>

The next question what do the words "in the interest of public order" mean. In *Suptl Central Prison v. Lohia*,<sup>7</sup> it was contended that the phrase "in the interest of public order" was of a wider connotation than the words "for the maintenance of public order" and, therefore, any breach of law which may have the tendency, however remote, to disturb the public order would be covered by the said phrase. Support was sought to be drawn for this wide proposition from the following observations of Das, C. J. in *Ramji Lal Modi v. State of U. P.*<sup>8</sup>

1. *Ram Manohar Lohia v. State of Bihar*, (1966) 1 SCR 709 : 1966 SC 740.
2. 1974 SC 255 (257).
3. 1974 SC 258.
4. *Superintendent, Central Prison v. Ram Manohar Lohia*, 1960 SC 633 (639).
5. (1940) 310 US 296 (308).
6. *Superintendent, Central Prison v. Ram Manohar Lohia*, 1960 SC 633 (638).
7. *Ibid.*
8. 1957 SCR 860 (865) : 1957 SC 620 (622).

"It will be noticed that the language employed in the amended clause is "in the interest of" and not "for the maintenance of". As the Supreme Court pointed out in *Debi Saron v. State of Bihar*,<sup>1</sup> the expression "in the interest of" makes the ambit of the protection very wide.

The Chief Justice again in *Virendra v. State of Punjab*,<sup>2</sup> had made observations much to the same effect : "As has been explained by this Court the words "in the interests of" are words of great amplitude and are much wider than the words "for the maintenance of".

The expression "in the interest of" makes the ambit of the protection very wide, for a law may not have been designed to directly maintain the public order or to directly protect the general public against any particular evil and yet it may have been enacted "in the interests of the public order or the general public as the case may be".

In *Superintendent, Central Prison v. Lohia*,<sup>3</sup> the Supreme Court through Subba Rao, J. said : "We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the Public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied therefrom ; and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act".

Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the state from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.<sup>4</sup>

The Supreme Court had occasion in *N. B. Khare v. State of Delhi*,<sup>5</sup> to define the scope of the judicial review under clause (5) of Art 19 where the phrase "imposing reasonable restriction on the exercise of the right" also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness ; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reason-

1. 1954 Pat. 254.

2. 1958 SCR 308 : 1957 SC 896.

3. 1960 SC 633 (639).

4. *Constitution of India*. Art. 19 (5).

5. 1950 SCR 519 : 1952 SC 199 ; *State of Madras v. V. G. Row*, 1952 SC 196 (199).

ableness, can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part and the limit to their interference with legislative judgment in such cases can only be dictated by their senses of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.<sup>1</sup>

Article 19 (4) also postulates that a rule may impose a reasonable restriction in the interests of the public order. In considering the scope of clause (4), it has to be borne in mind that the rule must be in the interest of public order and must amount to a reasonable restriction. The words "public order" occur even in clause (2), which refers, *inter alia*, to security of the State and public order. There can be no doubt that the said words must have the same meaning in both clauses (2) and (4). So far as clause (2) is concerned, security of the State having been expressly and specifically provided for public order cannot include the security of State, though in its widest sense it may be capable of including the said concept. Therefore, in clause (2), public order is virtually synonymous with public peace, safety and tranquillity. The denotation of the said words cannot be any wider in clause (4). When clause (4) refers to the restriction imposed in the interest of public order, it is necessary to enquire as to what is the effect of the words "in the interest of". This clause again cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect, the restriction can be said to be in the interest of public order. A restriction can be said to be in the interest of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression "in the interest of public order". The interpretation is strengthened by the other requirement of clause (4) that by itself, the restriction ought to be reasonable. It would be difficult to hold that a restriction which does not directly relate to public order can be said to be reasonable on the ground that its connection with public order is remote or far-fetched. Therefore, reading the two requirements of clause (4), it follows that the impugned restriction can be said to satisfy the test of clause (4) only if its connection with public order is shown to be rationally proximate and direct.<sup>2</sup> That is the view taken by the Supreme Court in *Superintendent, Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia*,<sup>3</sup> In the words of Patanjali Sastri, J. in *Rex v. Basudev*,<sup>4</sup> the connection contemplated between the restriction and public order must be real and proximate, not far-fetched or problematical. It is in the light of this legal position that the validity of the impugned rule must be determined.

The meaning of the expression "in the interest of public order" in two clauses was considered by the Supreme Court in *Superintendent, Central Prison*

1. *State of Madras v. V. G. Row*, 1953 SC 196 (199-200).

2. *O. K. Ghosh v. E. X. Joseph*, 1963 SC 812 (814).

3. 1960 SC 633.

4. 1949 FCR 657 (661) : 1950 FC 67 (69).

*v. Ram Manohar Lohia*,<sup>1</sup>. Speaking for the Court, Subba Rao, J. summarised his conclusion on the point in these terms : "Public order (Art. 19 (2) and (3) is synonymous with public safety and tranquillity. It is the absence of disorder involving breaches of local significance in contradistinction to national upheavals such as revolution, civil strife, war affecting the security of the State". In order that a legislation may be "in the interests of public order" there must be a proximate and reasonable nexus between the nature of the speech prohibited and public order. He rejected the argument that the phrase "in the interests of public order" was wider than the words "for the maintenance of public order" which were found in the Article as originally-enacted thereby sanctioned the enactment of a law which restricted the right merely because the speech had a tendency however remote to disturb public order. The connection has to be intimate, real and rational. The validity of the rule now impugned has to be judged with reference to the tests here propounded".<sup>2</sup>

The word "reasonable" has been defined by the Supreme Court in more than one decision. It has been held that in order to be reasonable, restrictions must have reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object. The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved, i. e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause.<sup>3</sup> In *Rex v. Basudeva*,<sup>4</sup> the appellant was detained in pursuance of the order made by the Government of U. P. under the U. P. Prevention of Black-Marketing (Temporary Powers) Act, 1947. The question was whether the preventive detention provided for in Section 3 (1) (i) of the said Act was preventive detention for reasons connected with the maintenance of public order. It was there urged that habitual black-marketing in essential commodities was bound sooner or later to cause a dislocation of the machinery of controlled distribution which, in turn, might lead to breaches of the peace and that, therefore, detention with a view to prevent such black-marketing was covered by the entry. Answering that argument, Patanjali Sastri, J., pointed out that activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot in, our opinion, fall within the purview of Entry 1 of List II. The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical".<sup>5</sup>

The limitation imposed in the interest of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.<sup>6</sup> Fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of democ-

1. (1960) 2 SCR 821 : 1960 SC 633 (639).

2. *Kameshwar Prasad v. State of Bihar*, 1962 SC 1166 (1171).

3. *Supdt., Central Prison v. Dr. Ram Manohar Lohia*, 1960 SC 633 (640).

4. 1950 FC 67.

5. *Supdt. of Central Prison v. Lohia*, 1960 SC 633 (640).

6. *Ibid.* p. 641.



ratio way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interests of public order. In this view, Section 3 of the Act was struck down as infringing the fundamental right guaranteed under Art. 19 (1) (a) of the Constitution.<sup>1</sup>

In *Dalbir Singh v. State of Punjab*,<sup>2</sup> the question to be considered was whether the connection between what was prohibited or penalised by the impugned provision and public order, i. e., the ensuring of tranquillity and orderly life was so remote or fanciful as to lead to an inference that there was no proximate connection between the two. The Supreme Court answered the question against the appellant and said the impugned enactment sought to lay an embargo on certain activities in the interests of the police service which was the arm of the State charged with the duty of ensuring and maintaining public order. The efficiency of that service and its utility in achieving the purpose for which it was formed and existed was sought to be secured by penalising attempts to undermine its loyalty and dissuading the members of that force from performing their functions and being available to the State as a disciplined body. Any breach in the discipline by its members must necessarily be reflected in a threat to public order and tranquillity. If the police force itself were indisciplined they could hardly serve as instruments for the maintenance of public order or function properly as the machinery through which order could be maintained among the general public.

In the interest of public order the State may prohibit and punish the causing of loud and raucous noise in the streets and public places by means of sound amplifying instruments, regulate the hours and place of public discussion, and the use of public streets for the purpose of exercising freedom of speech; provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere "public inconvenience, annoyance or unrest".<sup>3</sup>

### 23.27 Loudspeaker

In *Francis v. Chief of Police*,<sup>4</sup> the question was whether the legislation by requiring police permission for the use of microphone or other similar instruments at a public meeting offended against section 10 and 11 of the Constitution.<sup>5</sup> In other words given a situation where police approval had already been obtained to hold public meeting should a speaker for that meeting be put to the further requirement of having to seek police permission for the use of microphone also? Did the legislation in question have restricting or qualifying effect on the free exercise of the freedoms guaranteed by the Constitution, such as freedom of speech and of assembly? Did the freedom to speak lawfully at a lawful assembly of persons cover only the use of one's mere voice, but not a speaking instrument used for better or even adequate communication to the crowd?

"Liberty," says John Stuart Mill, "consists in doing what one desires. But the liberty of the individual must be thus far limited he must be thus far

1. *Suptd. Central Prison v. Lohia*, 1960 SC 633 (640).

2. *Dalbir Singh v. State of Punjab*, 1966 SC 1106 (1109).

3. *Suptd. Central Prison v. Lohia*, 1960 SC 633.

4. (1973) 2 All. ER 257 (253).

5. Correspondent to Art. 19 (1) and 19 (2) of the Indian Constitution

limited he must not make himself a nuisance to others." Man, as a rational being, desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed."<sup>1</sup> In the same case Mukherjea J, referred to the question 'of adjusting the conflicting interests of the individual and of the society. He said : 'What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.'<sup>2</sup>

In *Saia v. New York*<sup>3</sup> in the opinion of the Court by Douglas, J. which was as majority opinion it was said that Loud-speakers were today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached." On the other side (in the minority in that case, but in the majority in *Kovacs v. Cooper*<sup>4</sup> there was Frankfurter, J. with whom Reed and Burton, JJ concurred. He said :

"The appellant's loud-speakers blared forth in a small park in a small city. The negative power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undesired reading matter. But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy."

Lord Pearson noticed the conflicting opinions on the question delivered by the U. S. Supreme Court in two cases viz. *Saia v. New York* and *Kovacs v. Cooper*<sup>6</sup> and said. "The American judgments may not be a guide to the construction of section 10 because the First Amendment and Fourteenth Amendments have no provision corresponding to section 10 (2). There are two ways of construing section 10. One way is to read into sub-section (1) the necessary limitation as inherent in the fundamental freedom of expression and communication. The other way is to look first to sub-section (1) to see whether according to the literal meaning of the words 'there is a *prima facie* binding of or interference with the freedom of expression and communication and if, there is, look on to sub-section (2) to see whether such hindering or interference is justifiable. If the second way is adopted, the phrase "public order" must be given a meaning wide enough to cover action taken for avoidance of excessive noise seriously interfering with the comfort or convenience of a substantial number of persons. The phrase would of course cover action for avoidance of any behaviour likely to lead to breach of the peace, or perhaps excessive noise can be brought under that heading. Whatever may be the exact construction of section 10 it must be clear that (1) wrongful refusal to permission to use a loud speaker at a public meeting (for instance if the refusal is inspired by political partiality) would be unjustified and therefore unconstitutional interference with freedom of communication because it would restrict the range of communication ; and (2) some regulation of the use of loud speaker is required

1. *A. K. Gopalan v. State of Madras*, 1950 SCR 88 (190-191) : 1950<sub>4</sub>SC.

2. *Ibid.*

3. (1948) 334 US 558.

4. (1949) 336 US 77.

5. (1948) 334<sub>1</sub>US 458.

6. (1949) 336<sub>1</sub>US 77.

in order that citizens who do not wish to hear what is said may be protected against "aural aggression" if that unbearable intensity. As some regulation of noisy instruments is required and system of licensing is the natural method there must be some licensing authority to grant or refuse the permission.<sup>1</sup>

### 23.28 *Freedom of Speech and Morality.*

The republican state is particularly interested in the moral conditions of citizens. The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined the structure is weakened. When it is destroyed the fabric must fall such is the voice of universal history.<sup>2</sup> Just as it is of national concern and interest to protect their health, it is equally important to protect our youth, against the corruption of their morals, so that we may do everything within governmental power to afford them physical, mental and moral virility and not have their development arrested during the formation period. It is a national duty to prevent the moral or physical weakening of the family—"The Nursery of Mankind."<sup>3</sup>

To leave morality to the discretion and whim of every man is to deny morality; for any man may claim that his actions, no matter how evil they may seem to others, are acts which he hold to be good. Subjective morality not only upholds the conduct of sincere convinced eccentrics bigots but makes it possible for the hypocrite to cover his base purposes with the cloak of proclaimed good intentions.<sup>4</sup>

All forms of subjective morality are defective because they refuse to recognise that the very principle of morality is universality, the need to act with regard to a wider frame of reference than the individual. There could be no true good which is the good for me alone, but only the good for all.<sup>5</sup> The individual conscience cannot have the right to determine for itself how it shall act in society. It must take its key from the customs, laws and moral principles upheld by the community a given effect to through the institutions of family of society and the state.<sup>6</sup>

The law will not hold the crowd to the morality of the saints and seers. It will follow or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous.<sup>7</sup>

### 23.29 *Indecency*

In *Jacobellis v. Ohio*,<sup>8</sup> Chief Justice Warren said that "the court was faced with a resolution of rights basic both to individual and to society as a whole, especially we are called upon a reconcile the right of the Nation and of the States to maintain a *decent* society, and on the other hand, the right of individual to express themselves freely in accordance with the guarantees first and fourteenth amendments."

1. *Francis v. Chief of Police*, (1973) 2 All ER 251 (259).

2. *Trist v. Child*, 22 Led 623 (625).

3. *People v. Seltzer*, 122 M Misc. 322 cited in *Clor. Obscenity and Public Morality*, p. 181.

4. Macfarlane : *Modern Political Theory*, p. 79.

5. Macfarlane : *Modern Political Theory*, p. 79.

6. *Ibid.* p. 80.

7. Macfarlane : *Modern Political Theory*, p. 81.

8. 12 L ed 2d 793 (824).

Under our Constitution the right of freedom of speech is not absolute. It is subject to the right of the State.

The word 'indecent' has not been defined in our Constitution. The word 'decent' according to Websters Dictionary mean 'free of anything improper or suggestive of the unmodest,.....or obscene'. In *M' Gowan v. Langmuir*<sup>1</sup> Lord Sands said: "I do not think that the two words "indecent and obscene" are synonymous. The one may shade into the other but there is a difference of meaning. The matter might perhaps be roughly expressed thus in the ascending scale: Positive-Immodest; comparative—Indecent-superlative obscene. These however are not rigid categoives. Indecent is a milder term than obscene, agreeing with Lord Sands, Parker, C. J. said: "The words "indecent" or "obscene". convey one idea, namely offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale."

### 23.30. Obscenity.

The Constitution of India provides in Art. 19 (1) that all citizens shall have the right to freedom of speech and expression but Art. 19 (2) provides that nothing in that clause bars reasonable restrictions on the exercise of these rights in the interests of decency or morality. The First Amendment to the American Constitution contains no such qualifications and certainly when Jefferson and Madison drafted it, sex had as great potential for vulgarity as for beauty. 'If they had wanted', said Douglas, J, 'a federal censor to edit our publication, they certainly would have made it explicit.'<sup>2</sup> So far neither Parliament nor the State legislatures have defined what obscenity is. It is true that Art. 19 of the Constitution does not use the word obscenity, it does not follow that obscene literature is within the guaranteed right of speech and expression.

Obscenity is not mentioned in the USA Constitution or Bill of Rights. It is also not defined in our Constitution. The US Supreme Court has worked hard to define obscenity and has concededly failed.<sup>3</sup>

There are thus no constitutional guidelines for deciding what is indecent or obscene. The Courts are at large because they deal with tastes and standards of literature. 'What shocks me', said Doughlas, J, 'may be sustenance for my neighbour. What caused one person to boil up in rage over one pamphlet or movie may reflect only his views not shared by others. Obscenity cases usually generate tremendous emotional outbursts.'

The early leading standard of obscenity was defined in *Reg v. Hicklin*,<sup>4</sup> in which a pamphlet purporting to expose the errors and practices of the Roman Catholic Church in the matter of confession was held obscene, and in which Cockburn, C. J., said: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."<sup>5</sup>

1. Cited in (1965) 1 All ER 1035; *R. v. Stanley*. (1965) 1 All ER 1035 (1038); *R. v. Greater London Council*, (1976) 3 All ER 184 (195, 198).

2. *Hamling v. United States*, 41 L ed 2d 590 (674).

3. *Miller v. California*, 37 L ed 2d 419 (449).

4. (1968) LR 3 QB 368.

5. *Hamling v. United States*, 41 L ed 2d 1253 (1262).

The constitutional concept of obscenity was first developed in the United States in *Roth v. U. S.*,<sup>1</sup> "In so far as pertinent, the court, in an opinion, by Brennan, J., expressing the view of four other members of the court (Frankfurter, Burton, Clark, and Whittaker, JJ.), ruled : "(1) Obscenity is not within the area of constitutionally protected speech and press ; (2) considerations as to the "clear and present danger" rule are unnecessary ; (3) sex and obscenity are not synonymous ; (4) obscene material is material which deals with sex in a manner appealing to prurient interest ; (5) the portrayal of sex in art, literature, and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press ; (6) the proper test is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest ; and (7) judging obscenity by the effect of isolated passages upon the most susceptible person is inappropriate. The court observed that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance".<sup>2</sup>

In the landmark case of *Miller v. California*,<sup>3</sup> a case involving a challenge to the validity of a California obscenity statute, the court, in an opinion expressing the view of five members thereof (Burger, C. J., the author of the opinion, and White, Blackmun, Powell and Rehnquist, JJ.), reformulated the test for the determination of obscenity. Reviewing a defendant's conviction of violating a state statute making it a misdemeanor to knowingly distribute obscene matter, the court defined the standards concerning state statutes designed to regulate obscene material as follows : (1) The permissible scope of state regulation must be confined to works which depict or describe sexual conduct ; (2) that conduct must be specifically defined by the applicable state law, as written or authoritatively construed ; and (3) a state offence must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political or scientific value. The court then laid down the basic guidelines for the trier of facts, as follows : (a) whether "the average person, applying contemporary community standards", would find that the work, taken as a whole, appeals to the prurient interest ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The court cited *Kois v. Wisconsin*.<sup>5</sup> As to the tests described under (c) of the court's guidelines, the court recognized that medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy and hence have scientific value. The court refused to adopt as a constitutional standard the "utterly without redeeming social value" test stated in the plurality opinion in *Memoirs*.<sup>6</sup>

The term "prurient interest" was defined in *Roth v. United States*,<sup>6</sup> as relating to "material having a tendency to excite lustful thoughts". The court quoted the definition of the word "prurient" in Webster's New International

1. 1 L ed 2d 1498.

2. *Hamling v. U. S.*, 41 L ed 2d 1253 (1263).

3. (1973) 413 US 15 : 37 L ed 2d 419.

4. (1972) 408 US 229 : 33 L ed 2d 312 : quoting *Roth v. United States*, (1957) 354 US 476 : 1 L ed 2d 1498.

5. 383 US 413 : 16 L ed 2d 1 ; *Hamling v. United States*, 41 L ed 2d 1253 (1272-73)

6. (1957) 354 US 476 ; 1 L ed 2d 1498.

Dictionary (Unabridged, 2d edition, 1949). which, in pertinent part, reads as follows : “ . . . . Itching ; longing ; uneasy with desire or longing ; of persons, having itching, morbid, or lascivious longings ; of desire, curiosity or propensity, lewd . . . . ” The court also noted that “pruriency” is defined there, in pertinent part, as follows : “ . . . Quality of being prurient; lascivious desire or thoughti’.<sup>1</sup>

No majority of the court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the state’s police power. Under the holdings announced in *Miller* and in its companion cases, no one will be subject to prosecution for the sale or exposure of obscene materials unless the materials depict or describe patently offensive “hard-core” sexual conduct, if the inability to define regulated materials with ultimate, God-like precision altogether removes the power of the states or the Congress to regulate, then “hard-core” pornography may be exposed without limit to the juvenile, the passerby and the consenting adult alike”. A majority of the court has agreed on concrete guidelines to isolate “hard-core” pornography from expression protected by the First Amendment. The prohibiting of public portrayal of “hard-core” sexual conduct, for its own sake and for the ensuing commercial gain, does not repress the free and robust exchange of ideas. An regulation of patently offensive “hard-core” material is permissible, Although recognizing that it is not the function of the Supreme Court to propose regulatory schemes for the states, the court gave a few examples of what a state statute could define for regulation under a standard which makes the concept of obscenity depend upon whether a work depicts or describes, “in a patently offensive way”, sexual conduct, namely, (a) patently offensive representations or description of ultimate sexual acts, normal or perverted, actual or simulated, and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. However, the court recognized that at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.<sup>2</sup>

The court in *Hamling v United States*,<sup>3</sup> pointed out that while such description was not intended to be exhaustive, it clearly indicates that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is “patently offensive” within the meaning of the obscenity test set forth in *Miller* and in its companion cases.

As appears that the term “average person”, as used in the definition of obscenity insofar as that definition refers to the prurient-interest appeal to such person, excludes a particularly susceptible or sensitive person or a totally insensitive person, but does not preclude the determination of obscenity by the prurient-interest appeal to specific groups, such as sexual deviants or minors, as distinguished from adults.<sup>4</sup>

At the conclusion of a two-year study, the U. S. Commission on Obscenity and Pornography said :

“Society’s attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or

1. *Hamling v. U. S.*, 41 L ed 2d. 1253 (1274).

2. *Ibid.* p. 1275 : 41 Led 2d 590.

3. *Ibid.*

4. *Ibid.* p. 1276.

distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits materials to be deemed 'obscene' for adults only if as a whole it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community' standards and lacks 'redeeming social value'. These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries and courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials.<sup>1</sup>

### 23.31. Movies

Freedom of expression cannot and should not be interpreted as a licence for the cinemagnates to make money by pandering to, and thereby propagating shoddy and vulgar taste.

It has been almost universally recognised that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism) and its co-ordination of the visual and aural senses. The art of the cameraman, with trick photography, vistavision and three dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen. A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture. Therefore the treatment of the latter on a different footing is also a valid classification.<sup>2</sup>

Our fundamental law allows freedom of speech and expression to be restricted as clause (2) itself shows. It was observed in *Ranjit D. Udeshi v. State of Maharashtra*.<sup>3</sup> "Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions, or by the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality."

1. Report of the Commission on Obscenity and Pornography, 53 (1970); *Miller v. California*, 37 L ed 2d 429 (440).

2. *K. A. Abbas v. Union of India*, 1971 SC 481 (489).

3. 1965 SC 881 : (1965) 1 SCR 65 (70); 1971 SC 411 (494).

We adhere to this statement and indeed it is applicable to the other spheres where control is tolerated under our fundamental law.<sup>1</sup>

Censorship in India (and pre-censorship is not different in quality) has full justification in the field of the exhibition of cinema films. It is not generalized about other forms of speech and expression here for each such fundamental right has a different content and importance. The censorship imposed on the making and exhibition of films is in the interests of society. If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused. The Supreme Court held that censorship of films including prior restraint is justified under our Constitution.

The task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Hidayatullah, J. said "our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationship as banned in toto and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average man or moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in every thing, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censors' scissors. Thus audience in India can be expected to view with equanimity the story of Oedipus son of Latius who committed patricide and incest with his mother. When the seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly scenes depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Veerier Elwyn's *Phulmat of the Hills* or the same episode in Henryson's *Testament of Cressaid* (from where Verrier Elwyn borrowed the idea) would never see the light of the day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the sack of Delhi by Nadirshah may be permissible, if handled delicately and as part of an artistic portrayal of

1. *A.K. Abbas v. Union of India*, 1971 SC 481 (494).



the confrontation with Mohammad Shah Rangila. If Nadir Shah made golgothas of skulls, must we leave them out of story because people must be made to view a historical theme without true history? Rape in all its nakedness may be objectionable but Voltaire's *Candide* would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen."

Therefore it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors' but how the theme is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etchings of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement would do. One may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra* but a documentary from them as a practical sexual guide would be abhorrent.

"We have said", said Hidayatullah, J. "all this to show that the items mentioned in the directions are not by themselves defective. We have adhered to the 13 points of T. P. O., Connor framed in 1918 and have made a comprehensive list of what may not be shown. Parliament has left this task to the Central Government and, in our opinion, this could be done. But Parliament has not legislated enough, nor has the Central Government filled in the gap. Neither has separated the artistic and the sociably valuable from that which is deliberately indecent, obscene, horrifying or corrupting. They have not indicated the need of society and the freedom of the individual. They have not thought more of the depraved and less of the ordinary moral man. In their desire to keep films from the abnormal they have excluded the moral. They have attempted to bring down the public motion to the level of home movies".<sup>1</sup>

It was for this purpose that the Supreme Court was at pains to point out in *Runjit D. Udeshi's*<sup>2</sup> case, certain considerations for the guidance of censorship of books. The court observed that those guides work as well here. Although the Supreme Court was not inclined to hold that the directions are defective in so far as they go, but was of opinion that directions to emphasize the importance of art to a value judgment by the censors need to be included. Whether this is done by Parliament or by the Central Government it hardly matters. The whole of the law and the regulations under it will have always to be considered and if the further tests laid down here are followed, the system of censorship with the procedural safeguards will make censorship accord with our fundamental law.

### 23.32 Defamation and Libel.

The law of defamation seeks to protect individual reputation. Its central problem is how to reconcile this purpose with the competing demands of free speech. Both interests are highly valued in our society, the one as perhaps the most dearly prized attribute of civilised man the other the very foundation of a democratic community. This antithesis is particularly acute when the matter at issue is one of the public and general interest.<sup>3</sup> The law of defamation has two basic purposes: to enable the individual to protect his reputation and to preserve the right of free speech. These two purposes necessarily conflict.

<sup>1</sup> *K. A. Abbas v. Union of India*, 1971 SC 481 (499).

<sup>2</sup> (1965) 1 SCR 65 : 1965 SC 881.

<sup>3</sup> Fleming; *Law of Torts*, 5th ed. p. 516.

The law of defamation is ..... if it preserves a proper balance between them.<sup>1</sup>

"No one" said Brennan "can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is."<sup>2</sup>

Jefferson endorsed Madison's formula that "Congress shall make no law abridging the freedom of speech or the press" only after he suggested : "The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others....."<sup>3</sup>

Franklin, for example, observed : "If by the Liberty of the Press were understood merely the Liberty of discussing the propriety of Public Measures and political opinions, let us have as much of it as you please. But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abused myself".<sup>4</sup>

*Chaplinsky v. New Hampshire*<sup>5</sup> reflected the same view : "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be deprived from them is clearly outweighed by the social interest in order and morality."<sup>6</sup>

In *Roth v. United States*,<sup>7</sup> the court further examined the meaning of the First Amendment : "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*.<sup>8</sup> At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."<sup>9</sup>

1. Falks comments on the *Law of Defamation*, 1975 ed. p. 4.

2. *Gertz v. Welch* 41 L ed 2d. 789 (829).

3. *Ibid.*, p. 830.

4. *Ibid.* (830) F. N.

5. 315 US 568 ( 571-572) : 86 L ed 1031 : 41 L ed 2d 789 (831).

6. *Gertz v. Welch*, 41 L ed 2d 789 (831).

7. 354 US at 483 : 1 L ed 2d 1498. 41 L ed 2d 785

8. 343 US 250 (266) : 96 L ed 919.

9. *Gertz v. Welch*, 41 L ed 2d 789 (831-32).

In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither New York Times nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history any precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame the citizen".<sup>1</sup>

The private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

"It is a fallacy to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human beings a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth amendments. But this does not mean that the right is entitled to any less recognition by the U. S. Supreme Court as a basis of our constitutional system".<sup>2</sup>

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to overwhelm the other. 'Our experience as a Nation' said White, J. testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because 'the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition.'<sup>3</sup>

In *New York Times Co. v. Sullivan*,<sup>4</sup> the U.S. Supreme Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel *per se* under Alabama Law. This showing left the truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. That court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions".

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>5</sup>

1. W. Douglas : *The Right of the People*, 36 (1958) ; *Gertz v. Welch*, 41 L ed, 2d, 789 (832).

2. *Ibid.*, p. 840.

3. *Gertz v. Welch* 41 L ed 2d 789 (841).

4. 376 US 254 ; 11 L ed 2d 686 ; *Gertz v. Welch*, 41 L ed 2d 789 (802).

5. 11 L ed 2d 686 ; *Gertz v. Welch*, 41 L ed 2d p. 802.

Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of 'public figures.' This extension announced in *Curtis Publishing Co. v. Butts and its companion, Associated Press v. Walker*.<sup>1</sup>

Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.<sup>2</sup>

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.<sup>3</sup>

The English law, and the laws of other Commonwealth jurisdictions, have viewed the matter differently. As Fleming puts it : "In contrast to American law, our law has steadfastly declined to sacrifice individual reputation to extravagant demands by press for the privileged dissemination of so called 'news'. Discussion of public affairs is sufficiently encouraged by offering a defence for fair, if defamatory, comment upon true facts without going to the length of also condoning the dissemination of false defamatory facts. Our law does not esteem freedom of speech and of the press even in matters of public concern sufficiently high to clothe false statements of fact with qualified privilege let alone elevate it to a constitutional guarantee as in the United States."<sup>4</sup>

"Those who fill a public position must not be too thin skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust ; yet they must bear with them and submit to be misunderstood for a time."<sup>5</sup> "Whoever fills a public position renders himself open thereto. He must accept and attack as necessary, though unpleasant, appendage to his office."<sup>6</sup> Public men in such positions may as well think it worth their while to ignore such vulgar criticism and abuses hurled against them rather than give an importance to the same by prosecuting the persons responsible for the same.<sup>7</sup>

### 23.33 Contempt of Court.

In the words of Krishna Iyer. J. : "The cornerstone of the contempt law is the accommodation of two constitutional values—the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair

1. 388 US 130.(1962) : 18 L ed 2d 1049.

2. *Gertz v. Welch*, 41 Led 2d 789 (804).

3. *Ibid.*, p. 805-6.

4. Fleming : *on Torts*, 4th Ed. p. 499 ; Cowmen's *Individual Liberty*, 1977 ed p. 63.

5. *Seymour v. Butterworth*, (1962) 3 F. & F. 372, (376-377) per Cockburn, C. J. ; *R. v. Sir R. Carden*, (1879) 5 QBD 1.

6. *Kelley v. Sherlock*, (1866) 1 QB 686 (689), per Bramwell.

7. *Kartar Singh v. State of Punjab*, 1956 SC 541 (544) : 1956 SCR 476.

comment or trivial reflections on the judicial process and personnel.<sup>1</sup> Undoubtedly Judges and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.<sup>2</sup> No criticism of a judgment, however vigorous, can amount to contempt of court, providing (provided) it keeps within the limits of reasonable courtesy and good faith.<sup>3</sup> Lord Denning, M. R. in the same case further observed that "those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not." After referring to these cases, the contemner drew our attention to the celebrated passage of Lord Atkin in *Andre Paul v. Attorney-General*,<sup>4</sup> which has almost become a classic. It reads as under :

"But where the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public act done in the seat of justice. The path of criticism is a public way : the wrongheaded are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men".

The law on this subject of contempt of court is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.<sup>5</sup>

It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him.

A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt.

Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Muk-

1. *Rama Dayal v. State of M. P.*, 1978 SC 921 (926-27) : *Barada Kanta v. Registrar, Orissa, High Court*, 1974 SC 710 (735).

2. *Queen v. Gray*, (1900) 2 QB 36 (40).

3. *R. v. Commr. of Police of the Metropolis*, (1968) 2 WLR 1204 (1207).

4. 1936 PC 141 (145).

5. *Attorney General v. Times News Papers Ltd.*, (1973) 3 All ER 54 (60).

herjee, J. (as he then was) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity' ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties<sup>1</sup>

It is undoubted law that when litigation is pending and actively in suit before the Court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action as for instance by influencing the Judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is contempt of Court if he prejudges the truth before it is ascertained in the proceedings. To that rule about a fair trial there is thus further rule about bringing pressure to bear on a party, none shall by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a course so as to force him to drop his complaint, or to give up his defence or to come to a settlement or terms, which he would not otherwise have him prepared to entertain.<sup>1</sup> In *Attorney General v. Times Newspapers Ltd.*<sup>2</sup> Lord Denning said : "we must not allow 'trial by newspaper' or 'trial by television' or trial by any medium other than the Court of law. But in so stating the law, I would emphasise that it applies only 'when litigation is pending and is actively in suit before the Court'. To which I would add that there must appear to be a real and substantial danger of prejudice, to the trial of the case or to the settlement of it. And when considering the question it must always be remembered that, besides the interest of the parties in a fair trial or a fair settlement of the case, there is another important interest to be considered. It is the interest of the public in matters of national concern, and the freedom of the press to make fair comment on such matters. The one interest must be balanced against the other. There may be cases where the subject matter is such that the public interest counter balances the private interest of the parties. In such cases the public interest prevails".<sup>3</sup>

A valuable approach to the problem of contempt of court when the issue raised are of public moment is to be found in a passage from the judgment of Owen, J. in *Re Australian Consolidated Press Ltd. Ex parte Dawson*<sup>4</sup> The learned Judge said : "If in the course of ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The discussion of public affairs cannot be required to be suspended merely because the discussion may, as are incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at that time to be a litigant.

Fair comment is one thing, unfair comment or unfair pressure is another. However, good cause no one should resort to unfair tactics to force a settlement when they do not know and cannot know the rights and wrongs of the

1. *Brahma Prakash Sharma v. State of U. P.* 1953 SCR 1169 : 1954 SC 10 (14).

2. *Att. Gen. v. Times Newspapers Ltd.*, (1973) 1 All ER 815 (821) per Lord Denning. *The St. James Evening Post Case* (1742) 2 Atk 469 Per Lord Hardwicke. *Skipworths' case* (1873) LR 96B 230 (234) per Blackburn, J.

3. (1973) 8 All ER 815 (822) ; *Vine Products Ltd. v. Mackenzie & Co.*, (1965) 3 All ER 56 : 1966 1 CR 484.

4. *Attorney General v. Times News Papers Ltd.*, (1973) 1 All ER 815 (822).

dispute.<sup>1</sup> In *Attorney General v. Times Newspapers Ltd.*,<sup>2</sup> the court allowed the appeal saying that the article did not come into that category. It exerted pressure but legitimate pressure.

Our Law of contempt does not prevent comment before the litigation is started, nor after it has ended. Nor does it prevent it when the litigation is dormant and is not being actively pursued, if the pending action is one, which, as a matter of public interest ought to have been brought to trial long ago, or ought to have been settled long ago.

The newspapers can fairly comment on the failure to bring it to trial or to reach a settlement. It is active litigation which is protected by Law of contempt, not the absence of it. So long as the newspapers get these facts right, and keep their comments fair, they are without reproach. They do not offend against the law as to Contempt of Court unless there is real and substantial prejudice to pending litigation which is actively in suit.

Freedom of speech and expression will always prevail except where contempt is manifest, mischievous or substantial. The question always is on which side of the line the case falls.<sup>3</sup>

Freedom of speech goes far but not far enough to condone a case of real contempt of court.

Hidayatullah, C. J. in *R. C. Cooper v. Union of India*,<sup>4</sup> observed : "There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a Judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others. We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or Courts in hatred and contempt or obstructing directly or indirectly the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism."

"We are unable to appreciate how the law" said Sikri J., "as summarised in the cases places unreasonable restriction on the freedom of speech. But the argument of the first respondent was that we have now a written Constitution, like the United States of America, and if in the United States, in order to give effect to the liberty of speech and freedom of expression the common law has been

1. *Attorney General v. Times News Papers Ltd.* (1973) 1 All ER 815 (822).

2. *Ibid.*

3. *E.M.S. Namboodiripad v. T. N. Nambiar*, 1970 SC 2015 (2019).

4. (1970) 2 SCC 298 (301) : 1970 SC 1318 (1320-21); *C.K. Daphtary v. O.P. Gupta*, 1971 SC 1132 (1142).

departed from, we should also follow in their footsteps. But the American Constitution and the conditions in the United States are different from those in India. In the American Constitution there is no provision like Article 19 (2) of our Constitution."

The question whether the existing law of contempt is unreasonable within Article 19 (2) of the Constitution has been the subject of decisions in some of the High Courts. They have all come to the conclusion that the restrictions imposed by this law are reasonable.<sup>1</sup>

We are accordingly of the opinion that assuming that Article 19 (2) applies, the restrictions imposed by the existing law of contempt are reasonable and are in public interest.

### 23.34. *Incitement of offence.*

A state may punish those who abuse the freedom of speech by utterances inciting crime. Utterances inciting to the overthrow of organised government by unlawful means present a sufficient danger of the substantive evil to bring the punishment within the range of legislative discretion.<sup>2</sup> is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State.

A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.<sup>3</sup>

In this connection Section 505 of the Indian Penal Code may be quoted :

"505. Statements conducing to public mischief—Whoever makes, publishes or circulates any statement, rumour or report,—

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such ; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity ; or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community.

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception,—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.

1. *C. K. Daphtary v. O. P. Gupta*, 1971 SC 1132 (1144).

2. *Gitlow v. New York*, 69 L ed 1138 (1147).

3. *Ibid.*, p. 1146.



For an act or omission to be a cause of an event it must cause the event in the sense that the event would not have occurred but for the act or omission. However two sufficient causes may operate together, whether independently or complementarily.

In addition, the conduct in question must be an imputable cause of the event. Intended consequences are nearly always imputed ; the problems relate to unintended consequences.<sup>1</sup>

## FREEDOM OF ASSEMBLY

- 23 35. Freedom of Assembly.
- 23.36. Freedom of Assembly in Art. 19
- 23.37. Right of Assembly in England.
- 23 38. Public Meetings in England.
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- 23 40 Demonstrations.
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### 23 35. *Freedom of Assembly*

Freedom of Assembly is an essential element of any democratic system. At the root of this concept lies the citizens right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social. Public debate and discussion take many forms including the spoken and the printed word, the radio and the screen. But assemblies face to face perform a function of vital significance in our system, and are no less important at the present time for the education of the public and the formation of opinion than they have been in our past history. The basic assumption in a democratic policy is that Government shall be based on the consent of the governed. But the content of the governed implies not only that the consent shall be free but also that it shall be grounded on adequate information and discussion. Public streets are the actual places for expression of opinion and dissemination of ideas. Indeed it may be argued that for some persons these places are the only possible areas for the effective exercise of their freedom of speech and assembly.

The right of the peaceable assembly is regarded as cognate to those of free speech and free press and is equally fundamental. "The right", Chief Justice Hughes said "is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions. The greater the importance of safeguarding the community from incitements to the overthrow of an institution by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that charges if desired may be obtained by peaceful

1. Glanville Williams : *Textbook of Criminal Law* , p. 347.

mean. Therein lies the security of the Republic, the very foundation of Constitutional government.<sup>1</sup>

### 23.36. Freedom of Assembly in Art. 19.

The Constitution guarantees to citizens the right to assemble peaceably and without arms<sup>2</sup>

While prior to the coming into force of the Constitution the right to assembly could have been abridged or taken away by law, now that cannot be done except by reasonable restrictions within Article 19 (3).

Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of (the sovereignty and integrity of India or) public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

Our fundamental rights of free speech and assembly are modelled on the Bill of Rights of the Constitution of the U. S. A.

### 23.37. Right of assembly in England.

The guarantee of the right of assembly displays its most important justification not in the protection of demonstration as such but rather in the protection of mass participation in discussion and debate. The law in England does not give, recognise or guarantee a right of public meeting; but it does not forbid it, unless the exercise of the right can, in the circumstances, be shown to infringe some provision of the criminal law, of the law of tort, of a statute, or of a regulation having the force of a statute<sup>3</sup>

"Like the liberty of discussion", according to Holdsworth, "its existence, where it exists, and its limitations, depend upon deductions from the principles and rules, substantive and adjective, of the common law; and its content is similarly characterized by the two complementary ideas of liberty and responsibility to the law. The attitude which the common law of England has always taken with respect to this right was clearly and accurately expressed by Wills, J, in 1888.<sup>4</sup> He said: "It was urged that the right of public meeting, and the right of occupying any unoccupied land or highway that might seem appropriate to those of her Majesty's subjects who wish to meet there, were, if not synonymous, at least correlative. We fail to appreciate the argument, nor are we at all impressed with the serious consequences which it was said would follow from a contrary view. There has been no difficulty experienced in the past, and we anticipate none in the future when the only and legitimate object is public discussion, and no ulterior and injurious results are likely to happen. Things are done every day, in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right."

The right of a free speech and assembly, while fundamental in a democratic society, still does not mean that everyone with opinions or beliefs to

1. *United States v. Cruikshank*, 92 US 542 (552) : 23 L ed 588 (591).

2. *Constitution of India*, Art. 19 (3).

3. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 117-119.

4. *Lewis Exp.*, (1888) 21 QBD 197.

express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organised society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory applications, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances would be entitled to protection, and one cannot, contrary to traffic regulations, insist upon a street meeting in the middle of a busy locality at the rush hour claiming freedom of speech and assembly. Governmental authorities have the duty and responsibility to keep the streets open and available for movement.<sup>1</sup> A group of demonstrators cannot insist upon the right to cordon off a street or entrance to a public or private building and allow no one to pass who does not agree to listen to their exhortations.<sup>2</sup>

A claim on the part of persons so minded to assemble in any numbers and for so long a time as they please to remain assembled, to the detriment of others having equal rights, upon a highway, is in its nature irreconcilable with the right of free passage, and there is no authority whatever in favour of it.<sup>3</sup>

Under the law a person can only use the highway for the purposes for which it has been dedicated, i. e., to pass and repass and any other unlicensed use, however, desirable it may be from other standpoints, is legally wrongful.<sup>4</sup> As a public meeting is not one of the user for which the highway has been dedicated it is a nuisance if it appreciably obstructs the road. It is no defence to show that separate available space is left, if a part of the highway actually used by passengers is obstructed.<sup>5</sup>

### 23.38. Public Meetings in England

There is no right in England to hold a meeting on the public streets,<sup>6</sup> nor on a common,<sup>7</sup> nor in such places as Hyde Park<sup>8</sup> or Trafalgar Square,<sup>9</sup> "As regards the common law," Lord Dunedin declared in 1913, "I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets. Streets are for passage and passage is paramount to everything else."<sup>10</sup> But Lord Dunedin went to say: "That does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along. It is quite clear that citizens may meet in the streets and may stop and speak to each other. The whole thing is a question of degree and nothing else, and it is a question of degree which the magistrates are the proper persons to

1. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 117 ; Holdsworth ; *History of English Law*, Vol. 10, p. 701.

2. *Cox v. Luisiana*, 13 L ed 2d 471 (484).

3. *Exp. Lewis*, (1888) 21 QBD 197.

4. Goodhart : *Public Meetings and Processions*, 6 Cambridge Law Journal, p. 169.

5. *Ibid.*, p. 171.

6. *Homer v. Cadman*, (1886) 16 Cox CC 51 ; Fellman : *Constitutional Right of Association*, p. 92-93.

7. *De Morgan v. Metropolitan Board of Works*, (1880) 5 QBD 155.

8. *Bailey v. Williamson*, (1873) LR 8 QB 118.

9. *R. v. Cunninghame Graham*, (1888) 16 Cox CC 420.

10. *M' Ara v. Magistrates of Edinburgh*, (1913) SC (ct Sess) 1059 (1073).

consider in each case, and it is for them to take such measures as are necessary to preserve to the citizens in general that use which is paramount to all other uses of the streets." He conceded that the right of free speech undoubtedly exists, but he noted that this right is altogether separate from the question of where it is to be exercised. You may say what you like but that does not mean that you may say it anywhere."

In *Homer v. Caddin*<sup>1</sup> the appellant who had addressed a crowd from a chair placed in the highway was convicted of willfully obstructing the free passage of such highway. In rejecting the claim that there was a right to hold such a meeting Smith, J. said: "The appellant was only entitled to use the highway in an authorised manner, that is, to pass over it to and from. The fact that only a part of the highway was so obstructed seems to me to make no difference."

In *R. v. Cunningham & Graham*<sup>2</sup> it was argued that the Commissioner of Police had no power to forbid an orderly meeting but Charles, J. in charging the Jury said "undoubtedly Trafalgar-square has been used from time to time for public meetings. I can find no warrant for telling you that there is a right of public meeting either in Trafalgar-Square or any other public thoroughfare. The public have no right to hold there any meetings for discussion upon any questions, be they social, political or religious".

### 23.39. Public meetings on Public Streets in India

In *Sada Gopachariar v. A. Rama Rao*<sup>3</sup> it was held that the right to conduct religious processions through the public streets was a right inherent in every person, provided it did not, thereby, invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to directions or prohibitions for the prevention of obstructions to thoroughfares or breaches of the peace."

In *Vijaiaraghava Chariar v. Emperor*,<sup>4</sup> there was a difference of opinion. Benson, J. observed: "No doubt a highway is primarily intended for the use of individuals passing and re-passing along it in pursuit of their ordinary avocations, but in every country, and especially in India, highways have from time immemorial, been used for the passing and repassing of processions as well as of individuals and there is nothing illegal in a procession or assembly engaging in worship while passing along a highway, any more than in an individual doing so."

These cases were approved by the Privy Council in *Manzur Hasan v. Muhammed Zaman*,<sup>5</sup> In that case the Privy Council held: "In India, there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street by the public, and subject to lawful directions by the magistrates. A civil suit for declaration lies against those who interfere with a religious procession or its appropriate observation."

The Supreme Court followed the decision of the Privy Council in *Shaikh Piru Bux v. Kalandi Pati*<sup>6</sup>. It is true these decisions primarily deal with

1. 16 Cox CC 51.

2. 16 Cox CC 420.

3. ILR 26 M 376 : *Himat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 227 (237).

4. ILR 26 M 554.

5. 1925 PC 36.

6. (1963) 2 SCR 663 : 1970 SC 885.

processions but the statutes of the country, notably the Police Acts, deal with assemblies and processions on the same basis, and as pointed out by Benson, J., "a procession is but an assembly in motion."

Processions may use the streets for passage on lawful occasions and for lawful objects, provided the user is reasonable and there is no nuisance. Not all processions are lawful. They may fall within the group of offences known as riot, unlawful assembly and disturbing the peace or they may constitute a public nuisance.<sup>1</sup>

*Prima Facie* a procession, moving along a thoroughfare in a peaceful manner, would not be a nuisance but it may become so if the right is exercised unreasonably or with reckless disregard of the rights of others. No body of men has a right to appropriate the highway and exclude others from using it. The question, whether the user is reasonable or not, is a question of fact to be determined by common sense, with regard to ordinary experience, occasion, duration of the use, place and hour must also be considered. The matter is very much one of degree, and the whole circumstances must be kept in view before coming to a decision.<sup>2</sup>

There may be considerable obstruction and yet the use of the street may be quite reasonable. Take the case of a funeral of some distinguished man, some great Minister of State, some great military commander, some citizen for his own virtues. The funeral may consist of so many thousand of persons, that the whole street may be swept and the grateful physical obstruction caused—traffic brought absolutely to a standstill. Everyone knows that such a funeral is sure to cause a great physical obstruction. It is the natural and probable consequence of the funeral procession moving along the street. A funeral may be a most edifying manifestation. A large funeral whose numbers pass beyond the circle of private friendship is often; if not always, the tribute of the living to the conspicuous virtues which had distinguished the dead. Take again a regiment of soldiers marching along a street, playing a martial air, which invariably attracts on the footway an accompanying crowd which, if coming against you, you cannot get through. Take again some great civic pageant when the streets are thronged. These instances show that taking part in a procession, which may cause obstruction in the street and the natural and probable consequence of taking part in which was that obstruction would ensue, is not enough to create any liability. There must be something more. What more must there be? What other condition is necessary?<sup>3</sup>

In *Lowdens v. Keaveney*, Lowdens's band was playing party tunes through the streets of Belfast. The band was followed by a large crowd. A constable warned against playing through a particular street as an obstruction would be caused. The band persisted in playing through such street and the crowd followed with the result that the free passage of foot passengers and vehicles was temporarily interrupted. Lowdens was convicted. Quashing the conviction Lord O'Brien, Lord, C. J. observed: "The magistrate did not, nor do they, at all indicate that they considered the question whether the use of the street by a moving body in the way it was used was an unreasonable one. There may be considerable obstruction, and yet the use of the street may be quite reasonable. As to playing a party tune; this is not unlawful and as to the warning of the police, no doubt prudent and well disposed citizens will promptly accede to the suggestions of the police, but, the warning of the police

1. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 114 ; Goodhart : *Public Meetings and Processions*, 6 Camb. LJ p. 161 (1969).

2. *Lowdens v. Keaveney*, (1903) 2 Irish Reports, p. 82 (91), per Dawis, J.

3. *Ibid*, p. 82 (86-87).

could not merely of itself render the user of the highway unreasonable. It was for the Magistrate to determine the question of the reasonableness or unreasonableness of the use of the highway—this essential element they omitted and, accordingly the conviction must be quashed”.

The framers of the Constitution were aware that public meetings were being held in public streets and that the public have come to regard it as part of their rights and privileges as citizens. It is doubtful whether, under the common law of the land, they have any such right or privilege but, no body can deny the defacto exercise of the right in the belief that such a right existed, *Communis error facti jus* (common error makes the law.). This error was grounded on the solid substantum of continued practice over the years. The conferment of a fundamental right of public assembly would have been an exercise in futility, if the Government and the Local authorities could legally close all the normal places, where alone, the vast majority of the people could exercise the right.<sup>1</sup>

### 23.40. Demonstrations

It is only when political, religious, social or other demonstrations create public disturbances or operate as nuisances, or create or manifestly threaten some tangible public or private mischief that the law interferes. And, when it interferes, it does so because of the evil done and not because of the sentiments or purposes of the movement, if not otherwise unlawful. It is lawful to provide for dealing with mischief but it is not lawful to go beyond reasonable measures and precautions in anticipating it. Private liberty and public tranquility and security must both be kept in view.<sup>2</sup>

A demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech. A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles. It necessarily follows that there are forms of demonstration which would fall within the freedoms guaranteed by Art. 19 (1) (a) & 19 (1) (b). From the very nature of things a demonstration may take various forms ; it may be noisy and disorderly, for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Art. 19 (1) (a) or (b). It can equally be peaceful and orderly such as happens when the members of the group merely wear some badge drawing attention to their grievances.<sup>3</sup>

### 23.41. Demonstrations by Govt. Servants

The validity of R. 4-A, Central Civil Services (Conduct) Rules, 1955 was considered by the Supreme Court in *Kameshwar Prasad v. State of Bihar*.<sup>4</sup> In that case, the Court held that R. 4-A in the form in which it then stood prohibiting any form of demonstration was violative of the Government servants' rights under Art. 19 (1) (a) & (b) and should, therefore, be struck down. In striking down the rule in this limited way, the Court made it clear

1. *Himat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 226 (248).

2. *In re Frazee*, 63 Mich 396 ; Jagadish Swarup : *Human Rights and Fundamental Freedoms* p. 116.

3. *Kameshwar Prasad v. State of Bihar*, 1962 SC 1166 (1170).

4. 1962 SC 1166.

that in so far as the said rule prohibited a strike, is could not be struck down for the reason that there was no fundamental right to resort to a strike. In other words, if the rule was invalid against a Government servant on the ground that he had resorted to any form of strike specified by R. 4-A, the Government servant would not be able to contend that the rule was invalid in that behalf.<sup>1</sup>

In *Kameshwar Prasad v. State of Bihar*,<sup>2</sup> the impugned rule had not been so framed as to single out those types of demonstrations which were likely to lead to a disturbance of public tranquillity or which would have fallen under the other limiting criteria specified in Article 19 (2). The court held that the vice of the rule was that it laid a ban on every type of demonstration and does not confine itself to those forms of demonstration, which might have led to causing a breach of public tranquillity. The rule was struck down as unconstitutional.

The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes. Such a limitation is inherent in the exercise of those rights. The validity of that limitation is not to be judged by the tests prescribed by sub-Articles (2) and (3) of Article 19. In other words the contents of the freedoms guaranteed under Clauses (a), (b) and (c), do not include the right to exercise them in the properties belonging to others. If it is otherwise right then a citizen of this country in the exercise of his right under Clauses (d) and (e) of Article 19 (1) could move about freely in a public office or even reside there unless there exists some law imposing reasonable restrictions on the exercise of those rights.<sup>3</sup>

There is no fundamental right for anyone to hold meetings in government premises. If it is otherwise there is bound to be chaos in the offices. The fact that those who work in a public office can go there does not confer on them the right of holding a meeting at that office even if it be the most convenient place to do so.<sup>4</sup>

In the above case it was not disputed that the Northern Railway was the owner of the premises in question. The fact that the Indian Railways were State Undertakings did not affect their right to enjoy their properties in the same manner as any private individual may do subject only to such restrictions as the law or the usage may place on them. Hence unless it was shown that either under law or because of some usage the railway servants had a right to hold their meetings in railway premises, there could not be any basis for objecting to the direction given by the General Manager.<sup>5</sup>

The real point was whether the impugned rules framed by Commr. of Police Ahmedabad under the Bombay Police Act, violated Article 19 (1) (b). Rule 7 did not give any guidance to the officer authorised by the Commissioner of Police as to the circumstances in which he could refuse permission to hold a public meeting. The Supreme Court said that there was nothing wrong in requiring previous permission to be obtained before holding a public meeting

1. *O. K. Ghosh v. E. X. Joseph*, 1963 SC 812 (814).

2. 1962 SC 1166 (1172).

3. *Railway Board v. Niranjan Singh*, 1969 SC 966 (970).

4. *Ibid.* p. 969.

5. *Ibid.*

on a public street, for the right which flowed from Article 19 (1) (b) of the Constitution was not a right to hold meeting at any place and time. It was a right which could be regulated in the interest of all so that all could enjoy the right. Since Rule 7 conferred arbitrary powers on the officer authorised by the Commissioner of Police was struck down. Section 33 (1) of the Bombay Police Act in so far as it required prior permission for holding meetings was not ultra vires. It must be kept in mind that Article 19 (1) (b), read with Article 13, protects citizens against State action. It has nothing to do with the right to assemble on streets or property without the consent of the owners or, occupiers of the private property.<sup>1</sup>

### 23.42. *Unlawful Assembly*

Like all other rights of assembly does not and cannot exist without limitation. The right of assembly is qualified by the concept of unlawful assembly.

Unlawful assembly is defined in Section of the penal code. An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is First—To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or Second.—To resist the execution of any law, or of any legal process; or Third.—To commit any mischief or criminal trespass, or other offence; or Fourth.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or Fifth.—By means of criminal force, or show of criminal force, to compel any person to do, what he is not legally bound to do, or to omit what he is legally entitled to do.

An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

## FREEDOM OF ASSOCIATION

### SYNOPSIS

- 23.43. Freedom of association--Meaning of.
- 23.44. Political Party.
- 23.45. Trade Unions.
- 23.46. Right to form association.
- 23.47. Right to form association---Not an absolute right.
- 23.48. Fulfilling object---Not essential
- 23.49. Right of government servants to form association.

### 23.43. *Freedom of Association—Meaning of.*

Human beings are everywhere members of groups. They are utterly dependent on their relations with one another within those groups dependent

1. *Himat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 227 (240).



for their nature, their modes of living, their economic and spiritual sustenance and the continuance of their species. An association is a group organised for the pursuit of an interest or group of interests in common.<sup>1</sup>

An association is likely to be formed wherever people recognise a like, complimentary or common interest sufficiently enduring and sufficiently distinct to be capable of more effective promotion through collective action provided their differences outside the field of this interest are not so strong as to prevent the partial agreement involved in its formation.<sup>2</sup>

Every organized group, in seeking its own preservation or expansion endeavours in various ways to cultivate the common interest. For example, it devises symbols of its unity ; it emphasizes the common interest with slogans, appellations, of brotherhood, emblems, flags, festivals, parades, processions, initiation rites, rallies, intergroup competition and so on, all designed to evoke or sustain the *esprit de corps* of the members, to make them feel their solidarity.<sup>3</sup>

The most natural privilege of men, next to the right of acting for himself is that of combining his exertion with those of his fellow creatures and of acting in common with them.<sup>4</sup>

The right of association is as inalienable in its nature as the right of personal liberty.<sup>5</sup> It is the right of the individual to pick his own associates, so as to express his preferences and dislikes, and to fashion his private life by joining such groups as he chooses. Individual freedom is of little worth if it does not include the right to associate together for common purposes not prohibited by law.

The right of association, like the right of belief, is more than the right to attend a meeting ; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.<sup>6</sup>

"Freedom of association" as Laski said, "is a recognised legal right on the part of all persons to combine for the promotion of purposes in which they are interested".<sup>7</sup> The modern State, which is based on the consent of the governed and respects the liberty of individuals, is bound by its very nature, to acknowledge the liberty of individuals to associate with one another, provided that the purpose of such association is compatible with its own purpose and well being as the general and comprehensive association of all individuals.<sup>8</sup>

The right of association is not expressly included in the First Amendment to the American Constitution but its existence has always been held to be necessary in making the express guarantees of freedom of speech and expression

1 Jagdish Swarup : *Human Rights and Fundamental Freedoms*, p. 121 ; Mc Iver---*Society* p. 12.

2. *Ibid* , p. 437.

3. McIver---*Society*, p. 442.

4. De Tocqueville : *Democracy in America*, Vol. 1 p. 221.

5. *Ibid.*, p. 442.

6. *Grissold v. Connecticut*, 14 L. ed 2d 510 (514).

7. Laski : *Freedom of Association in Encyclopedia of Social Sciences*, p. 447.

8. Barker : *Introduction Gierk's Natural Law*, p. Ixi.

fully meaningful and the right of association has become a part of the bundle of rights protected by the First Amendment.<sup>1</sup>

Article 20 of the Universal Declaration of Human Rights, provides : (1) Every one has the right to freedom of peaceful Assembly and Association (2). No one may be compelled to belong to an association.

### 23.44. Political Party.

Political party is a group of human beings, stably organized with the objective of securing or maintaining for its leaders the control of a government, and with the further objective of giving to members of the party, through such control, ideal and material benefits and advantages.<sup>2</sup>

Our form of Government is built on the premise that every citizen shall have the right to engage in political expression and association. This right is enshrined in our Constitution. Exercise of these basic freedoms has been through the media of political associations.<sup>3</sup> Any interference with freedom of a party is an interference with the freedom of its adherents.<sup>4</sup>

There is no direct authorization of political parties in our Constitution. The right to form and belong to political parties can be gathered from other constitutional guarantees such as the right to assemble, the rights of free speech, right to form associations and the right to vote.

Government by the people is a progressive institution which seeks to give expression and effect to the wisest and best ideas of its members. No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government, and needs no expression in its constitution.<sup>5</sup>

A political party is 'a voluntary association', an association formed of the free will and unrestrained choice of those who compose it. No man is compelled by law to become a member of a political party ; or, after having become such, to remain a member. He may join such a party for whatever reason seems good to him and may quit the party for any cause, good, bad, or indifferent, or without cause. A political party is the creation of free men, acting according to their own wisdom, and in no sense whatever the creation of any department of the government."<sup>6</sup>

### 23.45. Trade Unions.

Trade or labour unions were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wages for the maintenance of himself and

1. *Grissold v. Connecticut*, 14 L ed 2d 510 (514).

2. Fredric : *Constitutional Govt. and Democracy*, p. 419.

3. *Sweezy v. New Hampshire*, 354 US 234 (250) : 1 L ed 2d 1311 (1325).

4. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 129.

5. *Britton v. Board of Election Commrs.*, 129 Cal 337, quoted in Fellman "The Constitutional Right of Association", p. 39.

6. *Bell v. Hill*, 123 Tex 531 (534) quoted in Fellman: *The Constitutional Right of Association*, p. 39.

family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employer and resist arbitrary and unfair treatment. Union was essential to give labourers opportunity to deal on an equality with their employer. They wanted to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them.<sup>1</sup>

**23.46. Right to form association,**

In the case of *State of Madras v. Row, V.G.*,<sup>2</sup> the point, which came up for consideration, was decided on the basis that persons forming an Association had a right under Article 19 (1) (c) to see that the composition of the Association continued as voluntarily agreed to by them. That decision was given in an appeal from a judgment of the High Court of Madras reported in *Row, V. G. v. The State of Madras*.<sup>3</sup> In the High Court, this principle was clearly formulated by Rajamanner, C. J., in the following words: "The word 'form' therefore, must refer not only to the initial commencement of the association, but also to the continuance of the association as such." This aspect was recognized by the Supreme Court, though not in plain words, in the case of *G.K. Ghosh v. E. X. Joseph*.<sup>4</sup>

In *Damayanti v. Union of India*,<sup>5</sup> it was argued that the right guaranteed by Article 19 (1) (c) was only to form an association and, consequently, any regulation of the affairs of the Association, after it had been formed would not amount to a breach of that right. "It is true", said Bhargava, J. "that it has been held by the Supreme Court that, after an Association had been formed and the right under Article 19 (1) (c) had been exercised by the members forming it, they had no right to claim that the activities must also be permitted to be carried on in the manner they desired but Hindi Sahitya Sammelan Act, 1962, did not merely regulate the administration of the affairs of the Society; what it did was to alter the composition of the Society itself. The result of the change in composition was that the members, who had voluntarily formed the Association, were compelled to act in that Association with other members who had been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interfered with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an association, necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the Voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Article 19 (1) (c) was confined to the initial stage of forming an Association and did not protect the right to continue the Association with the membership either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because, as soon as an Association was formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association".

1. *National Labour Relations Board v. Jones*, 81 L ed 893 (909).

2. 1952 SCR 597 : 1952 SC 196.

3. 1951 Mad 147 (FB).

4. 1963 SC 812.

5. 1971 SC 966 (971).

Not being protected under Article 19 (4), it was held by the Supreme Court that the provision contained in the Hindi Sahitya Sammelan Act for reconstituting the Society into the Sammelan was void. Once that section was declared void, the whole Act becomes ineffective inasmuch as the formation of the new Sammelan was the very basis for all the other provision contained in the Act.<sup>1</sup> The Act insofar as it interfered with the compositions of the Society in constituting the Sammelan, therefore, violated the right of the original members of the Society to form an association guaranteed under Article 19 (1) (c).

In *Tika Ramji v. State of U. P.*<sup>2</sup> it was contended that the impugned Act and the notification dated 27.9.1954 violated the fundamental right guaranteed under Art. 19 (1) (c) which was the right to form associations or unions. It was urged that the Cane-growers Co-operative Societies were not voluntary organisations but a cane-grower was compelled to become a member of the society before he could sell his sugarcane to a factory.

It was urged that the right to form associations or unions was a positive right and in that positive right there was necessarily implied the negative aspect which meant that a citizen had the right not to form associations or unions and he could not be compelled to become a member of an association or a union of a Cane-growers' Co-operative Society before he could sell his goods to the owner of a factory. If the right to carry on business carried with it by necessary implication a right not to carry on business, if the right to speak freely carried with it by necessary implication the right to refrain from speaking at all, the right to form associations or unions also carried with it by necessary implication the right not to form associations or unions. "Assuming that the right to form an association implied a right not to form an association". Bhagwati, J. said, "It did not follow that the negative right must also be regarded as a fundamental right. The citizens of India have many rights which have not been given the sanctity of fundamental rights and there was nothing absurd or uncommon if the positive right alone was made a fundamental right. The whole fallacy in the argument urged on behalf of the petitioners lay in this that it ignored that there was no compulsion at all on any cane grower to become a member of the Cane-growers' Co-operative Society".

It was with a view to eliminate unhealthy competition between the cane-growers on the one hand and the Cane-growers' Co-operative Societies on the other and also to prevent malpractices indulged in by the occupier of a factory for the purpose of breaking up the Cane-growers' Co-operative Society that such a provision was made and a notification issued prohibiting the occupier of a factory from making any purchases from the area except through the Cane-growers' Co-operative Society. It was a reasonable provision made for the benefit of the large number of persons forming the members of the Cane-growers' Co-operative Society and could not be impugned as in any manner violative of any fundamental right of the petitioners.<sup>3</sup>

### 23.47. Right to form association—Not absolute right.

The Constitution guarantees to all citizens the right to form associations or unions.<sup>4</sup> But this right though fundamental is not absolute and cannot exist without limitation. This guarantee does not affect the operation of any

1. *Damyanti v. Union of India*, 1971 SC 966 (972).

2. 1956 SCR 393 : 1956 SC 676 (708).

3. *Tika Ramji v. State of U. P.*, 1956 SC 708 (710).

4. *Constitution of India*, Art. 19 (4).

existing law in so far as it imposes or prevents the state from making any law imposing in the interest of the Sovereignty and integrity of India, or public order, or morality, reasonable restriction on the exercise of the right conferred.<sup>1</sup>

The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive government to impose restrictions on such right, without allowing the ground of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, must be taken into account in judging the reasonableness of the restriction imposed by Article 19 (2) (b) on the exercise of fundamental right under Art. 19 (1) (c).

Any restriction on the freedom of association will have ultimately to pass the judicial list of reasonableness.

Government can abridge this right of association in any of the four ways, (1) directly punishing the fact of membership in a group or association or the fact of attendance at a meeting of such a group or association ; (2) intruding upon the internal organization, or integral activities, of an association or group ; (3) withholding a privilege or benefit from the members of a group or association ; and (4) compelling disclosure of a group's membership or of an individual's associational affiliations.<sup>2</sup>

The most obvious cases in the fourth category, are those in which government seeks to outlaw an association or to punish the bare fact of affiliation with it. In these cases, the governing constitutional principle is two fold : First, an association or organization cannot be made illegal, whether on a conspiracy theory or otherwise, in the absence of a clear showing that the group is actively engaged in lawless conduct, or in such incitement to lawless action as would itself be punishable as a clear and present danger of harm that more speech could not avoid.<sup>3</sup> And second, an individual cannot be punished for joining, associating with, or attending meetings of, an association or organization unless the association meets the first requirement and the individual is shown to have affiliated with it (a) with knowledge of its illegality, and (b) with the specific intent of furthering its illegal aims by such affiliation. Although each of these requirements took time to evolve.<sup>4</sup>

The cases are easy from one perspective : anonymity has long been recognized as absolutely essential for the survival of dissident movements ; the glare of a public disclosure, so healthy in other settings, may operate in the context of protected but unpopular groups or beliefs as a clarion call to ostracism or worse. Thus the Court has had little difficulty recognizing, in such classic cases as *Talley v. California*,<sup>5</sup> *NAACP v. Alabama ex rel. Patterson*,<sup>6</sup> and *Shelton v. Tucker*,<sup>7</sup> that "compelled disclosure may constitute a restraint on freedom of association".

Early cases, never quite repudiated, upheld state power to ascertain the membership of the Ku Klux Klan<sup>8</sup> 'and the Communist<sup>9</sup> Party'. Later cases,

1. *Constitution of India*, Art. 19 (4).

2. *Tribe : American Constitutional Law*, p. 703.

3. *Ibid.* p. 707 ; *Noto v. United State*, 367 US 290.

4. *Tribe : American Constitutional Law*, p. 703.

5. 362 US 60 (64-5).

6. 357 US 449 (463-5).

7. 364 US 479.

8. *New York ex rel. Bryant v. Zimmerman*, 278 US 63.

9. *Communist Party of the U. S. v. S.A.C.B.*, 367 US 1.

now clearly representing settled law, refused to permit suspicion of connection with the Communist Part to justify compelled disclosure of the membership of the NAACP.<sup>1</sup>

### 23.48. Fulfilling object not essential.

Freedom to form an association does not carry with it the concomitant right that such association should be able to fulfil the objects of the association.<sup>2</sup>

In *All India Bank Employees Association v. National Industrial Tribunal*<sup>3</sup> the point for discussion could be formulated thus : When sub-clause (c) of Clause (1) of Article 19 guarantees the right to form associations, is a guarantee also implied that the fulfilment of every object of an association so formed is also a protected right, with the result that there is a constitutional guarantee that every association shall effectively achieve the purpose for which it was formed without interference by law except on grounds relevant to the preservation of public order or morality set out in Clause (4) of Art. 19.

Ayyangar, J., speaking for the Bench said "We are clearly of the opinion that this has to be answered in the negative. An affirmative answer would be contradictory of the scheme underlying the text and the frame of the several fundamental rights which are guaranteed by Part III and particularly by the scheme of the seven freedoms or groups of freedoms guaranteed by sub-clauses (a) to (g) of Clause (1) of Article 19. The acceptance of any such argument would mean that while in the case of an individual citizen to whom a right to carry on a trade or business or pursue an occupation is guaranteed by sub-clause (g) of Clause (1) of Article 19, the validity of a law which imposes any restriction on this guaranteed right would have to be tested by the criteria laid down by Clause (6) of Art. 19, if however he associated with another and carried on the same activity—say as a partnership, or as a company etc., he obtains larger rights of a different content and with different characteristics which include the right to have the validity of legislation restricting his activities tested by different standards, viz., those laid down in Clause (4) of Art. 19." But this position is rendered clearer by the fact that Art. 19 as contrasted with certain other Articles like Arts. 26, 29 and 30 grants rights to the citizen as such, and associations can lay claim to the fundamental rights guaranteed by that Article solely on the basis of their being an aggregation of citizens, i. e., in right of the citizens composing the body. As the stream can rise no higher than the source, associations of citizens cannot lay claim to rights not open to citizens, or claim, freedom from restrictions to which the citizens composing it are subject.

While the right to form a union is guaranteed by sub-clause (c) the right of the members of the association to meet would be guaranteed by sub-clause (b), their right to move from place to place within India by sub-clause (d), their right to discuss their problems and to propagate their views by sub-clause (a), their right to hold property would be that guaranteed by sub-clause (f) and so on—each of these freedoms being subject to such restrictions as might properly be imposed by Clauses (2) to (6) of Art. 19 as might be appropriate in the context. It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of

1. *Gibson v. Florida*, (1963) 372 US 539.

2. *All India Bank Employees Association v. National Industrial Tribunal*, 1962 SC 171 (179).

3. 1962 SC 171.

each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result.<sup>1</sup>

There is no doubt that in the context of the principles underlying the Constitution and the manner in which its Part III has been framed the guarantees embodied in it are to be interpreted in a liberal way so as to subserve the purpose for which the constitution makers intended them and not in any pedantic or narrow sense, but this however does not imply that the Court is at liberty to give an unnatural and artificial meaning to the expressions used based on ideological considerations.<sup>2</sup>

If the fulfilment of every object for which a union of workmen was formed were held to be a guaranteed right, it would logically follow that a similar content ought to be given to the same freedom when applied to a union of employers which would result in an absurdity.

It would be seen that if the right to strike were by implication a right guaranteed by sub-clause (c) of clause (1) of Article 19, then the restriction on that right in the interests of the general public viz., of national economy while perfectly legitimate if tested by the criteria in clause (6) of Article 19, might not be capable of being sustained as a reasonable restriction imposed for reasons of morality or public order. On the construction of the Article therefore, we have reached the conclusion that even a very liberal interpretation of sub-clause (c) of clause (1) of Art. 19 cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise. The right to strike or the right to declare a lock-out may be controlled or restricted by appropriate industrial legislation, and the validity of such legislation would have to be tested not with reference to the criteria laid down in clause (4) of Art 19 but by totally different considerations.<sup>3</sup>

Under the provisions of Forward Contracts (Regulation) Act, 1952, transaction in certain named commodities could be entered into only by associations registered by the Act. The petitions in *Raghubir Dayal v. Union of India*,<sup>4</sup> not registered and the argument regarding these provisions infringing the freedom to "form associations" was as follows : The Constitution guarantees to every citizen the right to form an association. The only limitation which might legally be imposed on this right to form an association is that set out in clause (4) of Art. 19 viz., by laws which place restrictions based on public order or morality. Where the object of the association is lawful, the citizen, through that association, and the association itself are entitled, by virtue of the guaranteed right, to freedom from legislative interference in the achievement of its object except on grounds germane to public order or morality. In other words, the freedom guaranteed should be read as extending not merely to the formation of the association as such, but to the effective functioning of the association so as to enable it to achieve its lawful objects.

Rejecting the argument Ayyangar, J. said : "In the first place, the restriction imposed by Section 6 of the Act is for the purpose of recognition and no association is compelled to apply to the Government for recognition under that Act. An application for the recognition of the association for the purpose of

1. *All India Bank Employees Association v. N. I. Tribunal*, 1962 SC 171 (180).

2. *Ibid.* p. 180.

3. *Ibid.* p. 181.

4. 1962 SC 263 (269).

functioning under the enactment is a voluntary act on the part of the association and if the statute imposes conditions subject to which alone recognition could be accorded or continued, it is a little difficult to see how the freedom to form the association is affected unless, of course, that freedom implies or involves a guaranteed right to recognition also. Could it be contended that there is a right in the association guaranteed by the Constitution to obtain recognition ?”<sup>1</sup>

### **23.49. Right of Government servant to form association**

Fundamental rights guaranteed by Article 19 can be claimed by government servants. There can be no doubt that government servants can be subjected to rules which are intended to maintain discipline amongst their ranks and to lead to an efficient discharge of their duties. Discipline amongst government employees and their efficiency may in a sense be related to public order. But in considering the scope of clause (4), it has to be borne in mind that the rule must be in the interest of public order and must amount to a reasonable restriction.

Rule 4-B Central Civil Services Conduct Rules imposed a restriction on the right of the government servants to form associations and unions. It naturally compelled a government servant to withdraw his membership of the service association of government servants as soon as recognition accorded to the said association was withdrawn or if, after the association was formed, no recognition was accorded to it within six months. In other words, the right to form an association was conditional by the trustee of the recognition of the said association by the government, could this restriction be said to be in the interest of public order and could this be said to be reasonable restriction? The Supreme Court answered this question in the negative. It is difficult to see, said Gajendragadkar C J., any direct or proximate or reasonable connection between the recognition by the government of the association and the discipline amongst and the efficiency of the members of the Association. Similarly it was difficult to see any connection between recognition and public order.

## **FREEDOM OF MOVEMENT**

### **SYNOPSIS**

- 23.50. Freedom of movement.
- 23.51. Interstate travel.
- 23.52. Restriction of right to travel abroad.
- 23.53. Domiciliary visits.
- 23.54. Surveillance.

### **23.50. Freedom of movement.**

(d) to move freely throughout the territory of India.<sup>3</sup>

The freedom of movement is the very essence of our free society, like the right of assembly and the right of association, it often makes all other

1. *Raghubir Dayal v. Union of India*, 1962 SC 263 (270).
2. *O. K. Ghosh v. E. X Joseph*, 1963 SC 812 (815),
3. *Constitution of India*, Art. 19 (d)



rights meaningful knowing, studying, arguing, exploring conversing, observing and even thinking. Once the right to travel is curtailed all other rights suffer, just as when curfew or home detention is placed on a person.<sup>1</sup>

In moving from state to state a citizen exercises a constitutional right or any classification which senses to penalise the exercise of that right unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.<sup>2</sup>

A California Statute prohibited the transporation of indigent persons across the California border. Declaring the Statute void, Douglas, J. said : "A State statute which obstructs or in substance prevent movement must fail. The result necessarily follows unless perchance a State can curtail the right of free movement of those who are poor or destitute. But to allow such an exception to be engrafted on the rights of national citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of national citizenship, a serious impairment of the principles of equality. Since the State statute here challenged involves such consequences it runs afoul of the privileges and immunities clause of the Fourteenth Amendment."<sup>3</sup>

In the same case, Mr. Justice Jackson emphasising the same aspect said : "Any measure which would divide our citizens on the basis of property into one class free to move from State to State and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship, no State may impose such a test, and whether the Congress could do so we are not called upon to inquire."<sup>4</sup>

### 23.51. *Inter state travel.*

The right of interstate travel is constitutionally protected under Art. 19 (1) (d). Freedom to travel throughout India which includes the Freedom to enter and reside in any State in the Union or in any Union territory is a basic right under the Constitution. This right to travel is an unconditional personal right whose exercise may not be conditioned,<sup>5</sup> except in the interest of general public or for the protection of the interest of any scheduled tribe.<sup>6</sup>

#### 23 51-A. *Right to travel abroad.*

In *Ken! v. Dulles*,<sup>7</sup> Douglars, J. said that "Freedom of movement across frontiers in either direction, and inside frontiers as well was a part of our

1. *Aptheker v. Secretary State*, 12 L ed 2d 992 (1006).

2. *Shapiro v. Thomson* 22 L ed 2d 600 (620).

3. *Edwards v. California* 86 Led 119 (129-31),

4. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 144.

5. *Dund v. Blumsten*, 312 (474).

6. *Constitution*, Art. 19 (5).

7. (1958) 357 US 116 : 2 L ed 2d 1204.

heritage. Travel abroad, like travel within the country, may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. What the learned Judge said in regard to freedom of movement in his country holds good in our country as well.<sup>1</sup>

In *Satwant Singh Sawhney v. Assistant Passport Officer*,<sup>2</sup> the Supreme Court ruled by majority that the expression "personal liberty" which occurred in Art. 21 of the Constitution included the right to travel abroad, and that no person could be deprived of that right except according to procedure prescribed by law. Since no law had been made by the state regulating or prohibiting the exercise of such right; the refusal of passport was in violation of Art. 21. It was also held that the since the discretion with the executive on the matter of issuing pass-port was in channelised and arbitrary, it was plainly violative of Art. 14 of the Constitution.

This decision was accepted by Parliament and the infirmity pointed out by it was set right by the enactment of the Passport Act, 1967.

### 23.52. Restriction on right to travel abroad.

In *Maneka Gandhi v. Union of India*,<sup>3</sup> one of the questions considered was "whether the right to go abroad was covered by Articles 19 (1) (a) or (g) of the Constitution and it was held that this right could not be regarded as included either in Freedom of Speech and expression guaranteed under Art. 19 (1) (a) or as part of the right to carry on trade or business, profession or calling guaranteed under Article 19 (1) (g). The right to go abroad is not a guaranteed right under any clause of Art. 19 (1) of the Constitution and that being so, Section 10 (3) (c) of the Passport Act, 1967 which authorised imposition on the restrictions on the right to go abroad was not bad

Passport cannot be held to be void as offending Article 19 (1) (a) or (g) of the Constitution as its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade business, profession or calling.<sup>4</sup>

In *Kharak Singh v. State of U. P.*,<sup>5</sup> the Supreme Court had occasion to consider the validity of Rule 236 of the Police Regulation providing for domiciliary visits. The court by majority held the Regulation did not have the force of law and it was unconstitutional for the reason that it abridge the fundamental right of a person under Art. 21. Regulation 8.56 which was in *pari materia* with Rule 236 for domiciliary visits was held to have the force of law by the Supreme Court in *Govind v. State*,<sup>6</sup> and the object of domiciliary visits was to see that the person subjected to surveillance was in his home and had not gone out of it for commission of an offence.

### 23.53. Domicillary visits.

Domiciliary visits mean visit to private dwelling by official persons in order to search or inspect.

1. *Maneka Gandhi v. Union of India*, 1978 SC 597 (641).

2. (1967) 3 SCR 525 · 1967 SC 1836.

3. (1978) 2 SCR 621 · 1978 SC 597.

4. *Ibid.*, p. 644.

5. (1964) 1 SCR 382 · 1963 SC 1295.

6. 1975 SC 1378.

**23.54. Surveillance.**

Discreet surveillance of suspects, habitual and potential offenders, may be necessary ; and so the maintenance of history sheet and surveillance register may be necessary too, for the purpose of prevention of crime. History sheets and surveillance registers have to be and are confidential documents. Neither the person whose name is entered in the register nor any other member of the public can have access to the surveillance register. The nature and character of the function involved in the making of an entry in the surveillance register is so utterly administrative and non-judicial that it is difficult to conceive of the application of the rule of *audi alteram partem*. Such enquiry as may be made has necessarily to be confidential and it necessarily exclude the application of that principle. In fact observance of the principles of natural justice may defeat the very object of the rule providing for surveillance.<sup>1</sup> There is every possibility of the ends of justice being defeated instead of being served. It was well observed in *Re. K (Infants)*.<sup>2</sup>

“But a principle of judicial inquiry whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed ; otherwise, it would become the master instead of the servant of justice” while it may not be necessary to supply the grounds of belief to the person whose names are entered in the surveillance register it may become necessary in some cases to satisfy the court when an entry is challenged that there are grounds to entertain such belief.

Surveillance may be intensive and it may so seriously encroach on the privacy at a citizen as to infringe his fundamental right to personal liberty guaranteed by Art. 21 of the Constitution and the freedom of movement guaranteed by Art. 19 (1)(d). That cannot be permitted. So long as surveillance is for the purpose of preventing crime, a person whose name is on the surveillance register can have no genuine cause for complaint.

## TO RESIDE AND SETTLE IN ANY PART OF INDIA

### SYNOPSIS

23.55 Article 19 (1) (e).

23.56 Extermment Orders.

**23.55. Article 19 (1) (e).**

(e) to reside and settle in any part of the territory of India ; and

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said clauses either in this interests of the general public or for the protection of the interests of any Schedule Tribe.”<sup>4</sup>

1. *Malak Singh v. State of Punjab*, 1981 SC 760 (763) Court had summoned the

2. 1965 AC 201 (238).

3. *Malak Singh v. State of Punjab*, 1981 SC 760 (763).

4. *Constitution of India*, Art. 19 (e) and clause (5).

Clause of Art. 19 (5) must be given its full meaning. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause. The Court, will be entitled to consider whether the restrictions on the right to move throughout India, i. e., as regards both the territory and the duration- are reasonable or not. The law providing reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years externment or ten years externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the Court under cl. (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine, if the exercise of the right has been reasonably restricted.<sup>1</sup> By this interpretation the scope and ambit of the word "reasonable" as applied to restrictions on the exercise of the right, is in any way unjustifiably enlarged.<sup>1</sup> It seems that the narrow construction sought to be put on the expression, to restrict the Court's power to consider only the substantive law or the point, is not correct. Whether the restrictions imposed by a legislature enactment would depend as such upon the procedural part of the law as upon its substantive part.<sup>2</sup>

### 23.56 Externment orders

In *Khare, N B. v. State of Delhi*<sup>3</sup> Khare was directed by the District Magistrate, Delhi not to remain in the Delhi District and immediately to remove himself from the Delhi District and not to return to the District. This order was passed under the East Punjab Public Safety Act, 1949 and was to be operative for three months. By majority the Supreme Court held that the restriction was in the circumstances of the case reasonable.

It is possible to conceive of an Indian citizen being guilty of serious prejudicial acts such as espionage and disloyalty to his country in which case he may render himself liable to the gravest penalty which the Government may think fit by law to impose upon him but it would be repugnant to all notions of democracy and opposed to the fundamental rights guaranteed in Part III of the Constitution to order his expulsion from the country, for to hold otherwise would be tantamount to destroying the right of citizenship conferred by Part II of the Constitution. Section 7 of the Influx from Pakistan (Control) Act, 1949 provided that the Central Government may by order direct the removal from India of any person who had committed an offence under the Act. The validity of this section was challenged in *Ebrahim Vazir State of Bombay*.<sup>4</sup>

The majority held that "A law which subjects a citizen to the extreme penalty of a virtual forfeiture of his citizenship upon conviction for a mere breach of the permit regulations or upon a reasonable suspicion of having committed such a breach could hardly be justified upon the ground that it

1. *Dr. N. B. Khare v. State of Delhi*, 1950 S.C. 211 (213).

2. *Gurbachan Singh v. State of Bombay*, 1962 SC 221 (224).

3. 1950 SC 211.

4. *Ebrahim Vazir v. State of Bombay*, 1954 SC 229.

imposed a reasonable restriction upon the fundamental right to reside and settle in the country in the interest of the public. The Act purports to control admission into and regulate the movements in India of persons entering from Pakistan but section 7 over stepped the limits of control and regulation when it provided for removal of a citizen from his own country.<sup>1</sup>

In *State of M. P. v. Bharat Singh*<sup>2</sup> by clause (ii) of the order the respondent was required to reside within the municipal limits of Jhabra town after proceeding to that place on receipt of that order. Under clause (b) of section (1) the State was authorised to order a person to reside in the place where he was ordinarily residing and also to require him to go any other area or place within the State and stay in that area or place. The Act did not give any opportunity to the person concerned of being heard before the place where he was to reside or remain. The Supreme Court held that clause (b) authorised the imposition of unreasonable restrictions in so far as it required any person to reside or remain in such place or within such area in Madhya Pradesh as may be specified. Shah, J. speaking for the Court said: 'The place selected may be one in which the person concerned may have no residential accommodation and no means of subsistence. It may not be possible for the person concerned to honestly secure the means of subsistence in the place selected'.

It must be borne in mind that where an Act authorises the District Magistrate to deprive a citizen of his fundamental right under Article 19 (1)(d) and (e), and though the object of the Act and its purpose would undoubtedly attract the provisions of Article 19 (5) care must always be taken in passing such Acts that they provide sufficient safeguards against casual capricious or even malicious exercise of the powers conferred by them. Where a statute empowers the specified authorities to take preventive action against the citizen it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as condition precedent to the exercise of the said authority. If the statute is silent in respect of one such conditions precedents it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Art. 19 (5).<sup>3</sup>

In the above case the Court held that the result of the infirmity was that the Act had left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a 'goonda'.

Section 57 of the Bombay Police Act, 1951 is an instance of the State taking preventive measures in the interest of the public and for safeguarding individual's rights. The section is plainly meant to prevent a person who has been proved to be a criminal from acting in a way which may be a repetition of his criminal propensities. In doing so the State may have to curb an individual's activities and put fetters on his complete freedom of movement and residence in order that the greatest good of the greatest number may be conserved. The law is based on the principle that it is desirable in the larger interests of society that the freedom of movement and residence of a comparatively fewer number of people should be restrained so that the majority of the

1. *Ebrahim Vazir v. State of Bombay*, 1950 SC 229 (231).

2. *State of M. P. v. Baldeo Prasad*, 1967 SC 293 (297-8).

3. *Ibid.* 298.

4. 1967 SC 1170.

5. *State of M. P. v. Baldeo Prasad*, 1961 SC 293 (297).

community may move and live in peace and harmony and carry on their peaceful avocations untrammelled by any fear or threat of violence to their person or property.<sup>1</sup>

In *Gurbachan Singh v. State of Bombay*<sup>2</sup> Section 27 (1) of the City of Bombay Police Act was under challenge and the court upheld the Constitutionality of that Section. Mukherjea, J. said that the "law was certainly an extraordinary one and had been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property were willing to depose publicly against certain bad characters whose presence in certain areas constituted a menace to the safety of the public residing therein.

In *Bhazu Bhai v. District Magistrate*<sup>3</sup> the words 'no witnesses' were emphasised as supporting the arguments that unless all the witnesses before the police were unwilling to give evidence in open court the provisions of section 56 of the Bombay Police Act could not be taken recourse to. Explaining the passage the Supreme Court said: 'The learned Judge did not mean to lay down and we do not understand him as having laid down that unless each every witness is unwilling to give evidence in open court the provisions of section 56 are not available to the Police'.

Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 imposes restriction girls and women leading a life of prostitution. In *State of U.P. v. Kaushaliya*<sup>4</sup> the question was does section 20 of the Act impose reasonable restrictions on the exercise of the fundamental right of the prostitutes under Art. 19 (1) (d) and (e) of the Constitution in the interests of the general public. Under Art. 19 (1) (d) the prostitute has a fundamental right to move freely throughout the territory of India; and under sub-cl. (e) thereof to reside and settle in any part of territory of India. Subba Rao, J. said, 'Under S. 20 of the Act the Magistrate can compel her to remove herself from the place where she is residing or which she is frequenting to places within or without the local limits of his jurisdiction by such route or routes and within such time as may be specified in the order and prohibit her from re-entering the place without his permission in writing. This is certainly a restriction on a citizen's fundamental right under Art. 19 (1) (d) and (e) of the Constitution. Whether a restriction is reasonable in the interests of the general public cannot be answered on a priori reasoning; it depends upon the peculiar circumstances of each case'.

The reasonableness of a restriction depends upon the values of life in a society, the circumstances obtaining at a particular point of time when the restriction is imposed, the degree and the urgency of the evil sought to be controlled and similar others. If in a particular locality the vice of prostitution is endemic degrading those who live by prostitution and demoralising others who come into contact with them, the Legislature may have to impose severe restrictions on the right of the prostitute to move about and to live in a house of her choice. If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. It cannot be gain said that the vice of prostitution is rampant in various parts of the country. There cannot be two views on the question of its control and regulation. One of the objects of the Act is to control the

1. *Hari v. Dy. Commr. of Police*, 1955 SC 559 (565).

2. 1952 SC 221 (224).

3. 1956 SC 585 (591).

4. *State of U P. v. Kaushallaya*, 1964 SC 416 (422).

growing evil of prostitution in public places. Under section 20 of the Act the freedom of movement and residence are regulated, an effective and safe judicial machinery is provided to carry out the objects of the Act. The said restrictions placed upon them are certainly in the interests of the general public and, as the imposition of the restrictions is done through a judicial process on the basis of a clearly disclosed policy, the said restrictions are clearly reasonable.<sup>1</sup>

"If the presence of a prostitute in a locality within the jurisdiction of a Magistrate has a demoralising influence on the public of that locality. having regard to the density of population, the existence of schools, colleges and other public institutions in the locality and other similar causes," Subba Rao, J, said "we do not see how an order of deportation may not be necessary to curb the evil and to improve the public morals. Once it is held that the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, are so subversive of public morals and so destructive of public health that it is necessary in public interest in to deport her from that place, we do not see any reason why the restrictions should be held to be unreasonable. Whether deportation out of the jurisdiction of Magistrate is necessary or not depends upon the facts of each case and the degree of the demoralising influence a particular prostitute is exercising in a particular locality. If in a particular case a Magistrate goes out of the way and makes an order which is clearly disproportionate to the evil influence exercised by a particular prostitute, she has a remedy by way of revision to an appropriate court."<sup>2</sup>

Under Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956, Magistrate if it appears to him that a particular girl or woman was a prostitute and that it was necessary in the interests of the general public that such woman or girl should be required to remove herself therefrom and be prohibited from entering the same, he shall require her to remove herself within a period specified, from the place to whether within or without the local limits of his jurisdiction. The Act was concerned to serve a public social purpose.

In *State of U. P. v. Kaushailiya*<sup>3</sup> the Magistrate order was challenged and Subba Rao J. said : "No right can be more important to a person than the right to select his or her home and to move about in the manner he or she likes. Even a depraved woman cannot be deprived of such a right except for good reasons." It was argued that the policy disclosed by the Act offended Art. 14 of the Constitution. Rejecting this contention the court observed that the differences between a woman who was a prostitute and one who was not certainly justify their being placed in different classes. So too, there were obvious differences between a prostitute who was a public nuisance and one who was not. A prostitute who carried on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not be so dangerous to public health or morals as a prostitutes who lived in a busy locality or in an over-crowded town or in a place within the easy reach of public institutions like religions and educational institutions. Though both sell their bodies the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the

1. *State of U.P. v. Kaushailaya*, 1964 SC 416 (422).

2. *Ibid.* p. 416 (422).

3. 1964 SC 416 (420).

vicinity of public institutions not only helps to demoralise the public morals but, what is worse, to spread diseases not only effecting the present generation, but also the future one. Such trade in public may also lead to scandals and unseemly broils. There are, therefore, pronounced and real differences between a woman who is a prostitute and one who is not, and between a prostitute, who does not demand in public interests any restrictions on her movements and even deportation. The object of the Act, is not only to suppress immoral traffic in women and girls, but also to improve public morals by removing prostitute from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act. Section 20, in order to prevent moral decadence in a busy locality, seeks to restrict the movements of the second category of prostitutes and to deport such of them as the peculiar methods of their operation in an area may demand.<sup>1</sup>

In *Begum v. State*<sup>2</sup> the Bombay Court had to consider the same question. It held that provisions of section 20 of the Act would not be hit by Art. 14 of the Constitution, though it held that the provisions of section 20 of the Act which enabled a Magistrate to direct a prostitute to remove herself from the place where she was residing to a place without the local limits of his jurisdiction was unreasonable restriction upon the fundamental right guaranteed under Art. 19 (1) (d) and (e) of the Constitution. The Supreme Court agreed with the High Court in so far as it held that the section did not offend Art. 14 of the Constitution but it did not accept the view expressed by it in respect of Art. 19 (1) (d) and (e) thereof.

## TO PRACTICE ANY PROFESSION OR CARRY ANY OCCUPATION TRADE OR BUSINESS

### S Y N O P S I S

23.57 Freedom to carry a business etc.

23.58 Calling or occupation.

23.59 Right to work.

23.60 Profession.

23.61 Medical Profession.

23.62 Legal Profession.

23.63 Business, Trade.

23.64 Gambling.

23.65 Trade in Liquor.

23.66 Freedom to contract.

23.67 Contract with Government.

1. *State of U. P. v. Kaushailaya*, 1964 SC 416 (421) ; *Shama Bai v. State of U. P.*, 1959 A 57 (overruled).

2. 1963 B. 17.



- 23.68 \* State monopoly.
- 23.69 Nationalization.
- 23.70 Monopolies.
- 23.71 Marketing Legislation.
- 23.72 Licensing.
- 23.73 Restrictions on the right to carry on business.
- 23.74 Restriction and Prohibition.
- 23.75 Black marketing.
- 23.76 Industries.
- 23.77 Right to close business.
- 23.78 Price fixation.
- 23.79 Price control.
- 23.80 Loss to producer.
- 23.81 Price Permits.
- 23.82 Price fixation---guidelines.
- 23.83 Price fixation on zonal basis.
- 23.84 Minimum wages.
- 23.85 Sales Tax.

### 23.57. *Freedom to carry on business etc.*

(g) to practise any profession, or to carry on any occupation, trade or business.<sup>1</sup>

### 23.58. *Calling or Occupation.*

The Constitution guarantees that every person shall have freedom to choose his occupation to the extent that it does not interfere with the public welfare. An occupation is a continuous activity in which an individual engages in order to maintain his own livelihood. In addition an occupation is by nature an activity apportioned by social functions through which one contributes to the continuity and development of society; and, as the locus where each person fulfils his personally endowed individuality, it also has an inseparable relationship to the personal worth of the individual. The reason why the constitution has guaranteed freedom to select an occupation as one of the fundamental human rights may also be said to lie in this characteristic and the significance of occupation in modern society. An occupation must be free not only with respect to independent choice that is to say in commencing continuing and abandoning an occupation but also free, in principle, with respect to performance itself in the chosen occupation that is, the form and content of occupational activities. Therefore, the provision should be interpreted to include not only freedom to choose an occupation in the narrow sense, but also a guarantee of freedom of occupational activity.<sup>2</sup>

### 23.59 *Right to work.*

The right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity. The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution. Liberty means more than freedom from servitude and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.<sup>3</sup>

1. Constitution, Art. 19 (g).

2. CCL Cases p. 286

3. *Smith v. Taxer*, 53 L ed. 1129; *Terrace v. Thompson*, 68 L ed 255; *Re Griffiths*, 37 L ed 2d 910; *Examining Board of Engineers v. Deoters*, 49 L ed 2d 65,

The guarantee is subject to the provisions of Article 19 (b) of the Constitution. There will be no arbitrary deprivation of the right of citizen to pursue a lawful calling, business or profession when the exercise of that right is forbidden because of a failure to comply with conditions prescribed by the state to protect society ; and the power of the state in providing for the general welfare authorises it to make an enforce such regulations as in its judgment will secure or tend to secure the people against the consequences alike of ignorance and incapacity and deception and fraud.<sup>1</sup>

### 23 60. Profession.

Indeed, because an occupation is in essence a social and, moreover, principally an economic activity, and by its nature something in which mutual social relations are great the demand for regulation by public authority is strong. Thus recognition under Art. 19 (6) of the Constitution of freedom of occupational choice with the reservation to the extent that the State may make any law imposing in the interests of the general public reasonable restrictions on the exercise of the right to carry on any occupation or to make any law relating to the technical qualifications for carrying on any occupation.

An occupation is a social activity within which the necessity for some sort of restriction is inherent. But because its type, nature, content and social significance and effects are extremely variegated and the social reasons and aims demanding such restrictions also are of infinite variety their importance also takes every kind of form and type in response to each situation. Some restrictions may totally forbid private persons from carrying on certain occupation, making these the monopoly of national or state government. Some may permit an occupation only to persons who fulfil certain fixed conditions and depending on circumstances proceed further to impose the duty upon these persons of performing and continuing these occupations. Others, while permitting freedom to commence, continue and abandon an occupation, regulate the manner in which it is carried out.

The State is not prevented from making any law relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.<sup>2</sup>

It is undoubtedly the right of every citizen in a democracy to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them

1. *Dent v. West Virginia*, 32 Led 623 (626).

2. *Constitution of India*, Art. 19 (6).

against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or licence from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection in their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.<sup>1</sup>

### 23 61. *Medical Profession.*

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend and requires not only a knowledge of the properties of vegetable and mineral substances but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his licence, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a licence, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, of a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.<sup>2</sup>

It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice. No one has a right to practice medicine without having the necessary qualifications of learning and skill, and whoever assumes, by offering to the community his services as a physician that he possesses such learning and skill, shall present evidence of it by a certificate or licence from a body designated by the State as competent to judge of his qualifications.<sup>3</sup> It is of high importance to the Community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans.<sup>4</sup>

1. Jagdish Swarup's *Human Rights and Fundamental Freedoms*, p. 154.

2. *Ibid.* p. 154.

3. *Dent v State of West Virginia*, 32 L ed 623 (625).

4. *Hawker v. State of New York*, 42 L ed 1002 (1005).

Character is as important a qualification as knowledge and the legislature may prescribe that evidence of good character should be furnished. Persons destitute of the moral qualification required, should not have the opportunity to enter professionally the families of the worthy but unsuspecting and be admitted to the secrets which the sick chamber must often entrust to them.<sup>1</sup>

The Medical Council of India constituted under the Medical Councils Act, 1956 prescribes the minimum standards of medical education acquired for granting recognised medical qualification by Universities. The Act has prescribed the standards of professional conduct and a code of ethics for medical practitioner. It requires medical practitioners to get themselves enrolled on a state medical register and persons other than those who are so enrolled are prohibited from practising medicine in any State.

### 23.62. Legal Profession.

In our country the law relating to legal practitioners is contained in the Advocates Act. Subject to the provisions of the Act and the Rules framed thereunder a person shall be qualified to be admitted as an advocate if he is a citizen of India, has completed the age of twenty-one years, has obtained a degree in law, has undergone a course of training in law and has passed an examination. He should also fulfil such other conditions as may be specified in Rules.

For carrying on the honourable profession of law, it is essential that certain standards should be maintained. To maintain such standards a certain amount of moral and intellectual background and equipment would be absolutely necessary. The recognised method of testing for such intellectual and moral background is a training in a University. The existence of a degree in Arts or Science cannot therefore, be regarded at any thing extraneous to the practice of the profession of law, or in any way arbitrary or beyond what is required in the interest of the public.<sup>2</sup>

The word 'practice' as applied to a legal practitioner includes, in the absence of any limiting or restrictive context, both the functions of acting and pleading.<sup>3</sup>

An advocate designated as senior advocate is in the matter of his practice, subject to such restrictions as the Bar Council of India may, in the interest of the legal profession prescribe.<sup>4</sup> One of such restriction is that a senior advocate shall only plead and not act.

Except as otherwise provided in the Advocates Act or in any other law for the time being in force no person shall be entitled to practise in any court or before any authority of persons unless he is enrolled as an advocate under the Act.<sup>5</sup> The Industrial Disputes Act is a special piece of legislation and it will prevail over the Advocates Act.<sup>6</sup>

1. *Hawker v. State of New York*, 42 Led 1002 (1005).

2. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 154.

3. *Aswini Kumar v. Arbinda Bose*, 1952 SC 369 (377) per Patanjali Shastri, J.

4. *Advocates Act*, Section 16.

5. *Advocates Act*, Section 733.

6. *Pradeep Port Trust v. Their Workmen*, 1977 SC 36.

It is no doubt well settled that where a citizen complains of the violation of fundamental rights contained in sub-clause (g) of clause (1) of Article 19 or for that matter in any of sub-clauses (a) to (g) thereof, the onus is on the State to prove or justify that the restraint or restrictions imposed on the fundamental rights under clauses (2) to (6) of the Article are reasonable.<sup>1</sup>

As far back as 1955 the Supreme Court in *Saghir Ahmad v. State of U. P.*,<sup>2</sup> made this position very clear and observed as follows :—

“There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (5) of the Article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community”.

A similar view was taken in *Mohammad Faruk v. State of Madhya Pradesh*,<sup>3</sup> where the Supreme Court, speaking through Shah, J. reiterated the position mentioned above in the following words :

“When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19 (1) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State”.

In *Lakshmi Khandhari v. State of U P.*,<sup>4</sup> the Court fully agreed with the contention that where there is a clear violation of Article 19 (1) (g), the State has to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction whether partial or complete, is in public interest and contains the quality of reasonableness.

It is abundantly clear that fundamental rights enshrined in Part III of the Constitution are neither absolute nor unlimited but are subject to reasonable restrictions which may be imposed by the State in public interest under clauses (2) to (6) of Article 19. As to what are reasonable restrictions would naturally depend on the nature and circumstances of the case, the character of the statute, the object which it seeks to serve.<sup>5</sup>

### 23.64. Gambling.

There are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude these activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words.<sup>6</sup>

1. *Lakshmi Khandhari v. State of U. P.*, (1981) 2 SCC 600 (609) : 1981 SC 872 (880).

2. 1954 SC 728 : (1955) 1 SCR 707.

3. 1970 SC 93 : (1969) 1 SCC 853.

4. 1981 SC 872 (880).

5. *Laxmi Khandhari v. State of U. P.*, 1981 SC 872 (880).

6. *State of Bombay v. Chamarbaugwala*, 1957 SCR 874 : 1957 SC 699 (718).

In *Chamarbaugwala* case<sup>1</sup> the contention was that the restriction imposed by the Bombay Lotteries and Prize Competition Control and Tax Act, 1948 on the trade or business of promoting a prize competition contravened the fundamental right guaranteed. Rejecting the contention Das, C. J. said : "It is difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and hereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject matter of a fundamental right guaranteed by Art. 19 (1) (g)."

"We find it difficult" said the Judge "to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Art. 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word a "trade" "business" or "intercourse". We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19 (1) (g) and 301 could not possibly have been to guarantee or declare the freedom of gambling". Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art. 19(1)(g) or Art. 301 of our constitution.<sup>2</sup>

A prize competition for which a solution is prepared before hand is clearly a gambling prize competition, for the competitors are only invited to guess what the solution prepared beforehand by the promoters might be. or in other words, as Lord Hewart, C. J. observed in *Coles v. Odhams Press Ltd.*,<sup>3</sup> "the competitors are invited to pay certain number of pence to have the opportunity of taking blind shots at a hidden target."

The prize competitions for which the solution was determined by lot, was necessarily a gambling adventure.

Nor has it been questioned that the third category, which comprised "any other competition success in which does not depend to a substantial degree upon the exercise of skill", constituted a gambling competition. At one time the notion was that in order to be branded as gambling the competition must be one success in which depended entirely on chance.

A competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognised to be of a gambling nature.<sup>4</sup>

### 23.65. Trade in Liquor

Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible with other trades are lawful

1. 1957 SC 699.

2. *State of Bombay v. R. M. D. Chamarbaugwala*, 1957 SC 699.

3. (1936) 1 KB 416 (A).

4. *State of Bombay v. R.M.D. Chamarbaugwala*, 1957 SC 699 (708).

and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, viz., manufacture, collection, sale and consumption.<sup>1</sup>

The state has the power to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Art. 47 of the Constitution states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. In *Balsara's*<sup>2</sup> case it was held that absolute prohibition of manufacture or sale of liquor was permissible and the only exception was for medicinal preparations. The concept of interest right of citizens to do business in liquor is anti-ethical to the power of the state to enforce prohibition laws in respect of liquor.

In *Crowley's* case<sup>3</sup> the United States Supreme Court said : "There is no inherent right in a citizen to sell intoxicating liquors by retail (it is not a privilege of a citizen of the State or of a citizen of the United States). As it is a business attended with danger to the community, it may be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evil. The manner and extent of regulation rest in the discretion of the governing authority."

The Supreme Court in *State of Assam v. Kedwai*<sup>4</sup> held that no person had any absolute right to sell liquor and in *Bharucha's*<sup>5</sup> case it was said that there was no inherent right of a citizens to carry on trade in intoxicating liquors.

The state has the exclusive right or privilege to manufacture and sell liquor. The state grants such rights or privilege in the shape of a licence or a lease. The state has the power to hold a public auction for grant of such right or privilege and accept payment of a sum in consideration of grant of licence or lease.<sup>6</sup>

There is no fundamental right to do trade or business in intoxicants. The state under its regulatory powers has the right to prohibit absolutely every form of acting in relation to intoxicants, its manufacture, storage, export, import sale and possession. In all their manifestations, their rights are rested in the state and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.<sup>7</sup>

Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such can not be the case with the

1. *Narshirwar v. State of Madhya Pradesh*, 1975 SC 360 (366) ; *State of Bombay v. F.N. Balsara*, 1951 SCR 68 : 1951 SC 318.

2. *State of Bombay v. Balsara*, 1951 SCR 68 : 1951 SC 318.

3. *Crowley v. Christensen*, 34 L ed 620 ; *Cooverjee Bharucha v. Excise Commr.*, 1954 SC 220 (223).

4. 1957 SCR 295 : 1957 SC 414.

5. *Cooverjee Bharucha v. Excise Commr.*, 1954 SCR 873 : 1954 SC 220 ; *Narshirwar v. State of Madhya Pradesh*, 1975 SC 360 (363).

6. *Narshirwar v. State of Madhya Pradesh*, 1975 SC 360 (367) ; *State of Bombay v. F.N. Balsara*, 1951 SCR 682 : 1951 SC 318.

7. *Ibid.*, p. 365.

business of liquor. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry.<sup>1</sup>

When every member of the public who wishes to carry on trade in liquor is invited to make bids and when the contract is thrown open to public auction, it can not be said that there is exclusion of competition and thereby a monopoly is created.

In *State of Bombay v. F. N. Balsara*<sup>2</sup> the constitutional validity of the Bombay Prohibition Act (XXV of 1949) in so far as it restricted the possession and sale of foreign liquor was impugned on the ground that it was an encroachment on the field assigned to the Dominion Legislature under Entry 19 of List I. Under Entry 31, List II to the Seventh Schedule of the Government of India Act, 1935, the Provincial Legislature had the power to make laws in respect of intoxicating liquor that is to say the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. The corresponding entry in the Constitution of India is List II Entry 8 which is in identical terms. The plea that was taken was that List I, Entry 19 conferred the power on the Dominion Legislature to make laws with respect to import, export across customs frontier and as such the State Law restricting possession and sale of foreign liquor encroached upon the field of Dominion Legislature. The Supreme Court held that the words 'possession and sale' occurring in Entry 31 List II must be read without any qualification. In considering the meaning of the words 'intoxicating liquor' set out in Entry 31 of List II, Gwyer, C. J. in *Bhola Prasad v. King, Emperor*,<sup>3</sup> stated as follows: "A power to legislate with respect to intoxicating liquors could not well be expressed in wider terms." Again the learned Chief Justice observed:—

"It is difficult to conceive of legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production, manufacture, possession, transport, purchase or sale; and these words seem apt to cover the whole field of possible legislation on the subject."

In *Naskirwar v. The State of Madhya Pradesh*,<sup>4</sup> Chief Justice Ray, held that the State Legislature was authorised to make a provision for public auction by reason of power contained in Entry 8 of List II of the Constitution. The decision negated the concept of inherent right of citizen to do business in liquor. The Supreme Court gave three principal reasons to hold that there was no fundamental right of citizen to carry on trade or to do business in liquor. First, there was the police power of the State to enforce public morality, to prohibit trades in noxious or dangerous goods. Second, there was power of the State to enforce an absolute prohibition of a manufacture or sale of intoxicating liquor. Art. 47 stated that the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise laws showed that the State had the exclusive right or privilege of manufacture or sale of liquor. After pointing out the three principal reasons, the Court followed the decision in *State of Bombay v. F. N. Balsara*<sup>5</sup> holding that absolute prohibition of manufacture or sale of liquor was permissible and

1. *Cooverjee Bharucha v. Excise Commissioner*, 1954 SC 220 (223).

2. (1951) 2 SCR 682; 19.

3. 1932 FCR 17 (26).

4. (1975) 2 SCR 861; *State of U. P. v. Synthetics and Chemicals Ltd.*, 1980 SC (619).

5. (1951) 2 SCR 682.



the only exception could be for medicinal preparations. In the context, it was clear that the decisions proceeded on the basis that the word 'intoxicating liquor' was not confined to potable liquor alone but would include all liquor which contained alcohol.

In *Balsara's* case (supra) after explicitly approving of the definition of word 'liquor' in various Abkari Acts, in the Provinces of India, the Court had held that liquor would not only cover alcoholic liquor which was generally used for beverage purposes and produced intoxication but would also include liquids containing alcohol.

*Cooverjee B. Barucha v. Excise Commissioner and Chief Commissioner, Ajmer*,<sup>1</sup> related to an auction sale of liquor shop under the Excise Regulations Act, 1915. It was held that licence may be restricted and that the restriction must be in regard to the sale of liquor and that there may be absolute prohibition of the sale of liquor. The Court also took into account the public expediency and public morality and police power of State to regulate business and mitigate evils.

In *M/s. Guruswamy & Company v. State of Mysore*<sup>2</sup> the auction related to exclusive privilege of selling toddy from certain shops. The Court held that the action enabled the licensee to sell the toddy and the licensee paid what he considered to be the equivalent value of the right. *State of Orissa v. Harinarayan Jaiswal*,<sup>3</sup> related to sale by public auction of the exclusive privilege of selling country liquor in retail shops, *Amar Chandra v. Collector of Excise, Tripura*,<sup>4</sup> also related to the cancellation of the licence by the Excise Collector to establish warehouse for the storage in bond and wholesale vend of country spirit by import and for supply to the excise vendors in the territory of Tripura. In *Har Shankar v. Dy. Excise and Taxation Commr*<sup>5</sup> Chandrachud, J. speaking for the Court stated :—"In our opinion the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decision of this Court in the *State of Bombay v. F. N. Balsara* (supra) *Cooverjee B. Barucha v. The Excise Commr and the Chief Commr, Ajmer*, (supra) *State of Assam v. A.N. Kidwai, Commr of Hills Division and Appeals, Shillong*,<sup>6</sup> *Nagendra Nath v. Commr. of Hills Division and Appeals, Assam*,<sup>7</sup> *Amar Chandra v. Collector of Excise, G. vt. of Tripura*,<sup>8</sup> and *State of Bombay v. R. M. D. Chamarbaugwala*,<sup>9</sup> as interpreted in *State of Orissa v. Harinarayan Jaiswal*<sup>10</sup> and *Nashirwar v. State of Madhya Pradesh*,<sup>11</sup> There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants its, manufacture, storage, export, import, sale and possession." After considering all the decisions of five Constitutional benches, Chandrachud, J. summed up the position as follows :

1. 1954 SCR 973.
2. (1967) 1 SCR 548.
3. (1972) 3 SCR 784.
4. (1973) 1 SCR 533.
5. (1975) 3 SCR 254.
6. 1957 SCR 295.
7. 1958 SCR 1240.
8. (1973) 1 SCR 533.
9. 1957 SCR 874.
10. (1972) 3 SCR 784.
11. 1975 SC 360.

"These unanimous decisions of five Constitutional Benches uniformly emphasised after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilised communities".<sup>1</sup>

In *Narula's* case (supra) it was held that dealing in liquor was business and that a citizen had a right to do business and that a business could make a law imposing restrictions on the rights in public interest. And unless dealing in liquor was not a trade or business a citizen had a fundamental right to deal in that commodity. This view did not find acceptance in later decisions and in *Nashirwar v. State of M. P.* (supra) Ray, C. J. said. "It is not correct to read that decision, that there was a fundamental right to do business in liquor".

The exercise of the power to regulate, including to direct closure for some days every week, being reasonable and calculated to produce temperance and promote social welfare, cannot be invalidated on the imaginary possibility of misuse. The test of the reasonableness of a provision is not the theoretical possibility of tyranny.

That was the view of the Supreme Court in *Barucha's* case (supra) and *Jaiswal's* case (supra). The nature of the trade is such that the State confers the right to vend liquor by framing out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by Government.<sup>2</sup>

The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. The nature of the trade is such that the state confers the right to vend liquor by farming out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.<sup>3</sup>

The grant of a lease either by public auction or for a sum is a regulation pertaining to liquor. One of the purposes is to raise revenue. Revenue is collected by the grant of contracts to carry on trade in liquor. The grantee is given a licence on payment of auction period.<sup>4</sup>

The licence fee has no relation to the production or manufacture of today. The only relation it has to the production and manufacture of today, is that it enables the licensee to sell it. The privilege of selling is auctioned well before the goods come into existence.

One of the important purposes of selling the exclusive right to vend liquor is to raise revenue and since the Government has the power to sell exclusive

1. *State of U. P. v. Synthetics Chemicals Lt. I.*, 1980 SC 614 (620).

2. *Nashirwar v. State of M. P.*, 1975 SC 360 (364).

3. *Nashirwar v. State of M. P.*, 1975 SC 360 (367); *Bharucha v. Excise Commissioner*, 1954 SC 220; *State of Orissa v. Hari Narain Jaiswal*, 1972 SC 1816.

4. *Nashirwar v. State of M. P.*, 1975 SC 360 (367); *Abdul Kadir v. State of Kerala*, 1962 SC 922.

privileges there to no basis for contending that the Government could not decline to accept the highest bid if though that the price offered was inadequate. It is for the Government to decide whether the price offered in an auction sale is adequate which accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review.<sup>1</sup>

In *Cooverjee Bharucha v. Excise Commissioner*<sup>2</sup> it was urged that the sale of intoxicating liquors by retail in small quantities should be without restriction because every person had a right inherent in him that is, a natural right to carry on trade in intoxicating liquors and that the State had no right to create a monopoly in them. This contention was repelled, on the reasoning contained in the judgment of Field, J. in *Crowley v. Christensen*<sup>3</sup> and the Chief Justice said that the provisions of the Regulation purported to regulate trade in liquor in all its different spheres and were valid.

The State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women can not be held to be illegal as enacting a prohibition and not a mere regulation. The right of every citizen to pursue any lawful trade and or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by odours they engender, and some by the dangers accompanying them require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold require also special qualifications in the parties permitted to use, manufacture or sell them."<sup>4</sup>

### 23.66. Freedom to Contract

Article 1 section 10 of the American Constitution forbids any State to pass any law impairing the obligation of contracts. Speaking about the clause Marshall, C. J. in *Dartmouth College v. Woodward*<sup>5</sup> said: "Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve, those purposes, ought to vary with varying circumstances. As the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What residuum of power is there still in the States, in relation to the operation of contract to protect the vital interests of the community? Questions of this character, of no small nicety and intricacy have vexed the legislatures as well as the judicial tribunals with an uncounted variety and frequency of litigation and speculation."

In *Home Building and Loan Association v. Blaisdell*<sup>6</sup> Hughes, C. J., speaking for the Supreme Court set at rest the doubts, when he said: "Not

1. *State of Orissa v. Hari Narain Jaiswal*, (1972) 3 SCR 784 : 1972 SC 1816 (1822).
2. 1954 SCR 873 : 1954 SC 220 (223).
3. (1899) 34 L ed 620 (623).
4. *Cooverjee Bharucha v. Excise Commissioner*, (1954) SCR 873 : 1954 SC 220 (223).
5. 4 Wheat 518 : 4 L ed 629.
6. 290 US 398 : 78 L ed 413 (424).

only is the constitutional provision qualified by the measure of control which the State retained over remedial processes, but the State also continues to possess authority to safeguard the vital interest of its people. It does not matter that legislation to that end has the result of modifying or abrogating contracts already in effect. Not only are existing law read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decision of this Court."

In the eighteenth and nineteenth century employment relations were based wholly on individual contract. Insecure, deprived of their human dignity, feeling a loss of social identity, employees turned to collective action in order to assert their essential humanity and fellowship; to reconstruct for themselves a social order which assured them certain rights and securities; and to deliver themselves from the role of pawns in a game devoid of human values.<sup>1</sup>

Modern lawyers agree that this is one of many manifestations of a movement back from contract to new forms of status (Friedmann 1972)<sup>2</sup> The trade-union movement is integrating the workers into what in effect amounts to a series of separate social orders<sup>3</sup>

Collective bargaining has substantially restored equality of bargaining power between employers and employees.

To the extent that the political parties, representing working classes interests gained an effective foothold in democratizing political systems they could hope for access to the levers of control.

Adjudication does not mean adjudication according to the strict law of master and servant. The award of the tribunal may contain provisions for settlement of a dispute which no Court could order if it was bound by ordinary law, but the tribunal is not fettered in any way by these limitations. In Volume I of "Labour Disputes and Collective Bargaining" by Ludwig Teller, it is said at page 536 that industrial arbitration may involve the extension of an existing agreement or the making of a new one, or in general the creation of new obligation or modification of old, ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements<sup>4</sup>

### 23.67. *Contract with Government.*

Restricting the invitation to submit tenders to a limited classes of persons was held to be violative of the equality clause, because the classification did not bear any just and reasonable relation to the object sought to be achieved, namely, selling of Tendu leaves in the interest of the general public. The standard or

1. Alan Fox---*Beyond Contract : Work, Power and Trust Relations*, p. 245-256: Tannenbaum : the True Society.

2. *Ibid.*, p. 246.

3. Freedman--*Law in Changing Society*.

4. *Western India Automobile Asso. v. Industrial Tribunal*, 1949 FC 111 (120).

norm laid down by the Government for entering into contracts of sale of Tendu leaves with third parties was discriminatory and could not stand the scrutiny of Article 14 and hence the scheme was held to be invalid. The Court rejected the contention of the Government that by reason of Section 10 it was entitled to dispose of Tendu leaves in such manner as it thought fit and there was no limitation upon its power to enter into contracts for sale of Tendu leaves with such persons it liked. The Court held that the Government was, in the exercise of its power to enter into contracts for sale of Tendu leaves, subject to the Constitutional limitation of Article 14 and it could not act arbitrarily in selecting persons with whom to enter into contracts and discriminate others similarly situate. The Court criticised the Government for not giving any explanation as to why an offer for a large amount was not accepted, the clearest implication being that the Government must act in the public interest; it cannot act arbitrarily and without reason and if it does so, its action would be liable to be invalidated.

In *C. K. Achuthan v State of Kerala*,<sup>1</sup> the facts were that the petitioner and respondent 3 Co operative Milk Supply Union, Cannanore, submitted tenders for the supply of milk to the Government hospital at Cannanore for the year 1948-49. The Superintendent who scrutinised the tenders accepted that of the petitioner and communicated the reasons for the decision to the Director of Public Health. The resulting contract in favour of the petitioner was, however, in pursuance of the policy of the Government that in the matter of supply to Government Medical Institutions, the Cooperative Milk Supply Union should be given contract on the basis of the prices fixed by the Revenue Department. The petitioner challenged the decision of the Government on the ground *inter alia* that there had been discrimination against him vis-a-vis respondent 3 and as such there was contravention of Article 14 of the Constitution. The Constitution Bench rejected this contention of the petitioner and while doing so, Hidayatullah, J, made the following observation : "There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of the person to fulfil a particular contract must be left on the Government".

The Court intended to lay down any absolute proposition permitting the State to act arbitrarily in the matter of entering into contract with third parties. We have no doubt that the Court could not have intended to lay down such a proposition because Hidayatullah, J., who delivered the judgment of the Court in this case was also a party to the judgment in *Rasbihari Panda v. State of Orissa*,<sup>2</sup> which was also a decision of the Constitution Bench, where it was held in so many terms that the State cannot act arbitrarily in selecting persons with whom to enter into contracts. Obviously what Court meant to say was that merely because one person is chosen in preference to another, it does not follow that there is a violation of Article 14, because the Government must necessarily be entitled to make a choice. But that does not mean that the choice be arbitrary or fanciful. The choice must be dictated by public interest and must not be unreasoned or unprincipled.

### 23.68, *State Monopoly*.

In *Akadasi Padhan v. State of Orissa*,<sup>3</sup> the question was as to what was the precise connotation of the expression "a law relating to" a State monopoly

1. 1959 SC 490 (492).

2. 1969 SC 1081 : (1969) 3 SCR 374.

3. 1963 SC 1047 ; *Minerva Mills Ltd., v. Union of India*, (1980) 3 SCC 716.

which occurs in Article 19 (6). The Supreme Court held that "a law relating to" a state monopoly cannot include all the provisions contained in such law but it must be construed to mean, "the law relating to the monopoly in its absolutely essential features" and it is only those provisions of the law "which are basically and essentially necessary for creating the State monopoly" which are protected by Article 19 (6). This view was reiterated in several subsequent decisions of this Court which include *inter alia* *Rashbihari Panda v. State of Orissa*,<sup>1</sup> *Vrajlal Manilal & Co. v. State of M. P.*,<sup>2</sup> and *R. C. Cooper v. Union of India*.<sup>3</sup>

The right to carry on business being a fundamental right under Art. 19 (1)(g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interests of the general public under Article 19 (6) (i).

Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19 (6), but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely.<sup>4</sup>

A 'monopoly' is defined to be an institution or allowance from the sovereign power of the State, by grant, commission or otherwise, to any person or corporation, for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies, politics or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade. All grants of this kind are void at common law, because they destroy the freedom of trade, discourage labour and industry, restrain persons from getting an honest livelihood and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment."<sup>5</sup>

To prevent the operation of the economic system in resulting in the concentration of economic power to the common detriment, and to control monopolies and prohibit monopolistic and restrictive practices, the Indian Parliament enacted the "Monopolies and Restrictive Trade Practices Act" in 1969. After the passing of the Act no person could establish any new undertaking which, when established would become an inter-connected undertaking of an undertaking having assets valued at twenty crores of more without the previous approval of the Central Government.

Similarly no scheme of merger, of amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking having assets worth twenty crores or more shall be sanctioned by any Court unless the scheme had been approved by Central Government.

The Act also provides for investigation, by a commission constituted under the Act, of monopolistic trade practices which have the effect of :

(a) Maintaining prices at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods of any description ;

1. 1969 SC 1081.

2. 1970 SC 129.

3. 1954 SC 220.

4. 1971 SC 246 (250).

5. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 149 : *Butcher's Union v. Crescent City*, 28 L ed 585 (590).

(b) unreasonably preventing or lessening competition in the production, supply or distribution of any goods ;

(c) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed to deteriorate.<sup>1</sup>

In *Ration Vikreta Sangh v. State of M. P.*,<sup>2</sup> the main challenge was that the scheme created a monopoly in trade in favour of co-operative societies and was thus violative of Articles 14 and 19 (1) (g) of the Constitution. The Supreme Court, rejected the contention in view of their previous decision in *Mannalal Jain v. State of Assam*.<sup>3</sup> In that case, the question was whether Clause 5 (e) of the Assam Foodgrains (Licensing and Control) Order, 1961, which provided for giving preference to co-operative societies created a monopoly in trade in favour of co-operative societies. On a construction of Clause 5 (e) which merely embodied a rule of preference in favour of co-operative societies, Court had held that Clause 5 (e) did not have the effect of creating a monopoly in favour of co-operative societies. The rule of preference to co-operative societies did not create a monopoly in trade and was, therefore, not violative of the petitioners fundamental rights under Arts. 14 and 19 (1) (g) of the Constitution. No one has a fundamental right to be appointed a Government agent for running a fair price shop which was a matter of grant of privilege.<sup>4</sup>

Clause (6) of Article 19 was amended by the Constitution (First Amendment) Act, 1951 and it was provided that in particular nothing in Clause 6 shall affect the operation of any existing law in so far as it relates to or prevent the State from working any law relating to the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial of citizens or otherwise.

“The new clause—Article 19 (6) was no doubt introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business: but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19 (6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a court of law, and no objection could be taken to it on the ground that it is an infringement of the rights guaranteed under Article 19 (1) (g) of the Constitution.”<sup>5</sup>

The expression “in particular” is not intended either to particularise or to illustrate the general. The scope of the amendment clause (6) of Article 19 came up before the Supreme Court in *Akadasi Padhan v. State of Orissa*.<sup>6</sup>

In dealings with the question about the precise denotation of the clause “a law relating to”, it is necessary to bear in mind that this clause occurs in Art. 19 (6) which is, in a sense, an exception to the main provision of Article 19 (1) (g). Laws protected by Article 19 (6) are regarded as valid even though they impinge upon the fundamental right guaranteed under Article 19 (1) (g). That is the effect of the scheme contained in Article 19 (1) read with clauses (2)

1. Jagadish Swarup : *Human Rights and Fundamental Freedoms*, p. 151.

2. 1981 3 SC 2003.

3. (1962) 3 SCR 936 : 1962 SC 386.

4. *Ration Vikreta Sangh v. State of M. P.*, 1981 SC 2003.

5. *Saghir Ahmad v. State of U. P.*, (1955) 1 SCR 707 : 1954 SC 728 (739).

6. (1963) Suppl. 2 SCR 691 : 1963 SC 1047.

to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant clause an unduly wide and liberal construction. "A law relating to a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. The said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19 (6)." If there are other provisions made by the Act which are subsidiary incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19 (6). In other words, the effect of the amendment made in Article 19 (6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Art. 19 (6) and would inevitably have to satisfy the test of the first part of Article 19 (6).<sup>1</sup>

A law relating to a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. "In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a monopoly, they do not fall under the first part of Article 19 (6)." The Court has further observed as follows :

".....the amendment (First Amendment) clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interest of general public, so far as Article 19 (1)(g) is concerned."

This was reiterated in *Rasbihari Panda v. State of Orissa*,<sup>2</sup> *Vrajlal Manilal and Co. v. State of Madhya Pradesh*<sup>3</sup> and *Municipal Committee, Amritsar v. State of Punjab*.<sup>4</sup> These cases dealt with the validity of laws creating monopolies in the State. Clause (6) is however not restricted to laws creating State monopolies, and the rule enunciated in *Akadasi Padhan's*<sup>5</sup> case applies to all laws relating to the carrying on by the State of any trade, business, industry or service by Art. 298 the State is authorized to carry on trade which is competitive; or excludes the citizens from that trade completely or partially. The "basic and essential" provisions of law which are "integrally and essentially connected" with the carrying on of a trade by the State will not be exposed to the challenge that they impair the guarantee under Article 19 (1) (g), whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizens or not must, however, satisfy the test of the main limb.

1. *Vrajlal M. & Co. v. State of M. P.*, 1970 129 (133); *Akadasi Padhan v. State of Orissa* (1963) Suppl. 2 SCR 691 (707); 1963 SC 1047 (1054).

2. 1969 SC 1081.

3. 1970 SC 129.

4. 1969 SC 1100.

5. 1963 SC 1047.



The law which prohibits after July 19, 1969, the named banks from carrying on banking business, being a necessary incident of the right assumed by the Union, is not liable to be challenged because of Article 19 (6) (ii) in so far as it affects the right to carry on business.<sup>1</sup>

By Punjab Cattle Fairs (Regulation) Act, 6 of 1968, a monopoly in favour of the State, was declared in the State of Punjab and all local authorities and individuals, were prohibited to hold cattle fairs at any place in the State. This prohibition flowed directly, from the assumption of monopoly by the State and fell within the terms of Article 19 (6) of the Constitution. It was held in *Amritsar Municipality v. State of Punjab*,<sup>2</sup> that the law was not open to challenge. The trade of Tendu leaves in the State of Orissa was regulated by the Orissa Tendu Leaves (Control of Trade) Act, 1961 and this Act created a monopoly in favour of the State so far as purchase of Tendu leaves from growers and pluckers was concerned. Section 10 of the Act authorised the Government to sell or otherwise dispose of Tendu leaves purchased in such manner as the Government might direct. The Government first evolved a scheme under which it offered to renew the licences of those traders who in its view had worked satisfactorily in the previous year and had regularly paid the amounts due from them. The Government withdrew the scheme and instead, decided to invite tenders for advance purchases of Tendu but restricted the invitation to those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government. This method of sale of Tendu leaves was challenged on the ground *inter alia* that it was violative of Articles 14 and 19 (1) (g) and this challenge, though negatived by the High Court, was upheld by the Supreme Court in appeal. The court pointed out that the original scheme of offering to enter into contracts with the old licencees and to renew their term was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade and the new scheme under which the Government restricted the invitation to make efforts to those traders who had carried out their contracts in the previous year without default and to the satisfaction of the Government was also objectionable, since the right to make tenders for the purchase of Tendu leaves being restricted to a limited class of persons, it effectively shut out all other persons carrying on trade in Tendu leaves and also the new entrants into that business and hence it was *ex facie* discriminatory and imposed unreasonable restrictions upon the right of persons other than the existing contractors to carry on business. Both the schemes evolved by the Government were thus held to be violative of Articles 14 and 19 (1) (g) because they "gave rise to a monopoly in the trade in Tendu leaves to certain traders and singled out other traders for discriminatory treatment. The argument that existing contractors who had carried out their obligations in the previous year regularly and to the satisfaction of the Government formed a valid basis of classification bearing a just and reasonable relation to the object sought to be achieved by the sale, namely, effective execution of the monopoly in the public interest, was also negatived and it was pointed out that : "exclusion of all persons interested in the trade, who were not in the previous year licencees, is *ex facie* arbitrary : it had no direct relation to the object of preventing exploitation of pluckers and growers of Tendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State."<sup>3</sup>

1. 1970 SC 564 (600).

2. 1969 SC 1100 (1105).

3. *Rashbihari Panda v. State of Orissa*, 1969 SC 1081 (1087); *Vrajlal v. State of M. P.*, SC 129.

Whenever there is a switch over from 'private sector' to 'public sector' it does not necessarily follow that a change of policy requiring express legislative sanction is involved. It depends on the subject and the statute. For example, if a decision is taken to impose a general and complete ban on private mining of all minor minerals, such a ban may involve the reversal of a major policy and so it may require legislative sanction. 'But if a decision is taken to ban private mining of a single minor mineral for the purpose of conserving it, such a ban, if it is otherwise within the bounds of the authority given to the government by the statute, cannot be said to involve any change of policy. The policy of the Act remains the same and it is, as we said, the conservation and the prudent and discriminating exploitation of minerals, with a view to secure maximum benefit to the community. Exploitation of minerals by the private and/or the public sector is contemplated. If in the pursuit of the avowed policy of the Act, it is thought exploitation by the public sector is best and wisest in the case of a particular mineral and, in consequence, the authority competent to make the subordinate legislation makes a rule banning private exploitation of such mineral, which was hitherto permitted we are unable to see any change of policy merely because what was previously permitted is no longer permitted.'<sup>1</sup>

### 23.69. Nationalisation.

In *Akadasi Pradhan v. State of Orissa*,<sup>2</sup> Gajendragadkar, J. speaking for the Court said: 'To the rationalist, nationalisation or State ownership is a matter of expediency dominated by the considerations of economic efficiency and increased out put of production.

'The amendment made by the legislature in Art. 19 (6) shows that according to the legislature a law relating to the creation of State monopoly should be presumed to be in the interest of the general public. Art. 19 (6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State Monopoly. The amendment clearly indicates that State monopoly in respect of any trade or trade or business must be presumed to be reasonable and in the interests of general public, so far as Art. 19 (1) (g) is concerned'.

In *State of Tamil Nadu v. L. Abu Kavur Bai*,<sup>3</sup> it was held by the Supreme Court that 'once it is held that the policy of nationalisation of transport services is valid, which is no doubt an essential service and a type of state monopoly, any consequence that may follow cannot be taken into consideration; otherwise no social reform can ever be brought about. All schemes of monopoly or nationalisation are meant to serve the public good and individual interests in such cases must yield to the good of the general public. 'It seems to us' said Fazal Ali, J. 'that the courts while interpreting the policy of total nationalisation and being imbued with a keen sense of the doctrine of justice and fair play have projected the question of compensation in a very limited sense and a restricted extent by holding that the word 'amount' merely means some sort of a reasonable amount which may or may not be adequate in the circumstances'.

In *State of Karnataka v. Ranganatha Reddy*,<sup>4</sup> Untawalia, J. pointed out that taking over the transport service was undoubtedly for the common good,

1. *State of Tamil Nadu v. Hind Stone*, (1981) 2 SCC 205 (216).

2. 1963 SC 1047.

3. 1984 SC 326 (334).

4. 1978 SC 215.

of the people and was not meant for augmenting the revenue of the State because the profits if any made by the services would go to accomplish projects for the betterment of the community and made the following observations : 'The Legislature thought that to prevent such misuse and to promote for the facilities to transport passengers and to the general public it is necessary to acquire vehicles, permits and all rights titles and interest of the contract carriage operators in or over lands, building, workshops and other places and all stores, instruments, machinery, tools, plants etc. as mentioned in sub-section (2) of Section 4 of the Act',

Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Act was enacted to nationalise the State Transport industry by stages. The Supreme Court in *State of Tamil Nadu v. Abu Kavur Bai*,<sup>1</sup> upheld the validity of the Act and said that by virtue of the nationalisation the policy of the twin objects of the Art. 29 (b) and (c) were fully secured.

### 23.71. Marketing Legislation.

It is in the interest of the producers of agricultural produce that they can get the best competitive prices in an open market and they have not to pay the middlemen. Sale or purchase of agricultural produce in such a market under the control and supervision and control of the market committee is likely to be advantages to the producers and the use of standard weights must eliminate the possibility of his being victimised by malpractices. Supervision of the operations in the notified area can be more conveniently done if business is carried on in a specific area or areas intended for that purpose.<sup>2</sup>

Marketing legislation which seeks to enable producers to get a fair price for the commodities by eliminating middlemen and providing a regulated market cannot be said to impose unreasonable restriction on the citizens right to do business.<sup>3</sup>

In *Arunachala Nasar v. State of Madras*,<sup>4</sup> the Supreme Court upheld the validity of the Madras Commercial Crops Market Act, 1938, which provided for the establishment of certain controlled market for the sale of commercial crops and provided that after the establishment of such markets no person shall be allowed to establish any other market within the specified distance of the controlled market so that the grower of such crops would be obliged to resort to the controlled markets only for the sale of their produce. It was held that both the restrictions as to the place where transaction of purchase or sale of commercial crops would be effected and the total or substantial elimination of middlemen was a reasonable restriction in order to prevent the exploitation of the poor cultivators engaged in the production of commercial crops.<sup>5</sup>

In *Mohammad Hussain v. State of Bombay*,<sup>6</sup> and *Mohammad Bhui v. State of Gujarat*,<sup>7</sup> and *Sreenivasa General Traders v. State of A. P.*<sup>8</sup> the

1. 1984 SC 326 (346).

2. *Sreenivasa General Traders v. State of A. P.*, 1983 SC 1246 (1237).

3. *Ibid.*, p. 1254.

4. (1959) Suppl. (1) SCR 92 : 1959 SC 300.

5. *Sreenivasa General Traders v. State of A.P.* 1246 1983 SC (1255).

6. (1962) 2 SCR 659 : 1962 SC 97.

7. (1962) Suppl. 3 SCR 875 : 1962 SC 1515,

8. 1983 SC 1246.

Supreme Court has held that the Agricultural Produce Markets Act, does not violate Article 19 (1) (g)

### 23.72. Licensing

The byelaws generally permit the Municipality, as the licensing authority to grant or to refuse licences. No body has an unqualified right to get a licence on mere application. It is open to the licensing authority indeed, and is obligatory on its part to take note of all relevant circumstances, various factors enter the verdict and the Municipalities are the best judge of these factual factors. The local bodies should not however, succumb to religious susceptibilities or fanatical sentiments and refuse licenses where fundamental rights have to be respected.<sup>1</sup>

#### *Export or Import Licence.*

No one has any vested rights to an import licence in terms of the policy in force at that time of his application. There is no absolute right much less a fundamental right to the grant of an import licence.<sup>2</sup>

Policies of imports or exports are fashioned not only with reference to internal or international trade but also on monetary policy, the development of agriculture and industries and even on the political policies. If the Government decides an economic policy that import or export should be by a selected channel or through selected agencies, this decision will be deemed to be in the interest of the general public unless the contrary is shown.

Canalisation of export or import through selected licencees causing elimination of other traders amounts to a reasonable restriction in the interest of the general public. The scheme of canalisation of imports is in the interest of the general public and so is the refusal of licence to outsiders.<sup>3</sup>

#### *Licence Fee*

The "Licence Fee" which the Government charged to the licencees through the medium of auctions or the "Fixed Fee" which it charged to the vendors of foreign liquor is neither a Tax nor a "fee". By 'licence fee' or 'fixed fee' is meant the price or consideration which the Government charges to the licencees for parting with its privileges and granting them to the licencees. It is in the nature of the price of privilege which the purchaser has to pay in any trading or business transaction. As the State can carry on a trade or a business, such a charge is the normal incident of a trading or business transaction.<sup>4</sup>

#### *Licence fee for business*

A licence fee on a business operates as a restriction on the licensee to carry on his business for without payment of such fee the business cannot be carried on at all. If the licence fee cannot be justified on the basis of any valid law no question of its reasonableness can arise for an illegal import must at all times be an unreasonable restriction and will necessarily infringe the

1. *Khatki Ahmed v. Limdi Municipality*, 1979 SC 418 (419).

2. *Dy. Asstt. Iron and Steel Controller v. Manickchand*, (1972) 3 SCR 1 : 1972 SC 935 ; *Fernandu v. Dy. Chief Controller*, 1975 SC 1208 (1215).

3. (1962) 1 SCR 862 : 1961 SC 1514 ; *Daruha & Co. v. Union of India*, (1974) 1 SCR 570 : 1973 SC 2711 (2716).

4. *Har Shanker v. Excise and Tax Com.*, 1975 SC 1121 (1133-34).

right of the citizen to carry on his occupation, trade or business under Art. 19 (1) (g).<sup>1</sup>

In *Rashbihari Pandu v. State of Orissa*<sup>2</sup> the Government invited offers for advance purchases of Tendu leaves but restricted the invitation to those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government. The scheme was held by the Supreme Court to be discriminatory and unreasonable restriction upon the rights of persons other than the existing contractors and the scheme of selected purchasers was not protected by Article 19 (6) (ii).

*Bhatnagars & Co. v. Union of India*,<sup>3</sup> importers resorted to malpractices leading to speculation and fluctuation in prices. The Government, therefore, canalised distribution of the goods by inviting tenders for the grant of import licences. The Supreme Court held that it was open to the Government in national interest to intervene and regulate the distribution in a suitable manner.

The power to regulate sale through licensed vendors to whom quotas are allotted and who are permitted to sell yarn at fixed prices was upheld in *M/s Dwarika Prasad Laxmi Narain* case.<sup>4</sup> In such cases there is a possibility of mischief if no rule or principle to guide them was stated or where no check or control by higher authority was intended. The Textile Commissioner in the case was guided by the provisions of clause 30 of the order as well as by section 3 of the Essential Commodities Act. The rules or principles for guidance are first equitable distribution, and, second availability at fair price. Prices are fixed with limited profit to traders. Further, an aggrieved person can appeal to the Central Government.<sup>5</sup>

In *Mann Lal Jain v. State of Assam*<sup>6</sup> the Assam Foodgrains (Licensing and Control) Order, 1961 conferred power on the authority to have regard to Co-operative Societies in the grant of licences. This Supreme Court held that such preference did not create a monopoly. The Co-operative Societies in villages were held to be in a better position for maintaining or increasing supplies and for securing equitable distribution and availability at fair prices in accordance with village economy. The question is whether prohibition of others doing the business is reasonable under Article 19 (6).

Canalisation orders have been upheld by the Supreme Court as reasonable within Article 19 (6) of the Constitution. In *Daruka & Co. v. Union of India*,<sup>7</sup> the Supreme Court referred to the earlier decision of *Glass Chaton* case,<sup>8</sup> *Daya son of Bhimji Gohil*<sup>9</sup> case and upheld the distributing channels of imports and exports of different commodities and goods.

### 23.73. Restrictions on the right to carry on business.

(5) Nothing in sub-clause (d) and (e) of the said clause shall affect the

1. *Mohd. Yasin v. Town Area Committee*, 1952 SC115 (117).

2. 1969 SC 1081.

3. 1957 SC 478.

4. 1954 SC 224.

5. *Shree Meenakshi Mills v. Union of India*, 1974 SC 366 (386).

6. 1962 SC 386.

7. 1973 SC 2711.

8. 1961 SC 1514.

9. 1962 SC 1796.

operation of any existing law so far as it imposes or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation any any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far it relates to, or prevent the State from making any law relating to :—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade business industry or service whether to the exclusion complete or partial of citizens or otherwise.

In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of State policy set forth in Art. 47 of the Constitution.<sup>1</sup>

Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.<sup>2</sup> In the case of *Chintaman Rao v. State of Madhya Pradesh*,<sup>3</sup> the Court observed that : “The phrase ‘reasonable restriction’ connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interest of the public. The word ‘reasonable’ implies intelligent care and deliberation, that is, the choice of a course which, reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in that quality.” What is required is that the legislature takes intelligent care and deliberation in choosing a course which is dictated by reason and good conscience so as to strike a just balance between the freedom contained in Art. 19 (1) and the social control permitted by clauses (5) and (6) of Art. 19. This view was reiterated in the case of *M/s. Dwarka Prasad Luxmi Narain v. State of Uttar Pradesh*,<sup>4</sup> where it was pointed out that in order to judge the quality of the reasonableness no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will have to vary from case to case and with regard to changing conditions, the values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances, all of which must enter into the judicial verdict in other words, the position is that the court has to make not a rigid or dogmatic but an elastic and pragmatic approach to the facts of the case and to take an overall view of all the circumstances, factors and issues facing the situation.

1. *State of Bombay v. F. N. Balsara*, 1951 SC 318.

2. *Pathumma v. State of Kerala*, 1978 SC 771 (777).

3. 1951 SC 118 (119).

4. 1954 SC 224 (227).

*Judicial review—of restriction.*

The nature of the right alleged to have been infringed, the underlying purpose of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part. This view was endorsed in the case of *Mohd. Hanif Qurashi v. State of Bihar*,<sup>1</sup> where the court observed: "In determining reasonableness the court, cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration what is reasonable from the point of view of the person or persons on whom the restrictions are imposed".

Similarly in the case of the *Lord Krishna Sugar Mills Ltd. v. Union of India*,<sup>2</sup> the Court observed that the Court in judging the reasonableness of a law will necessarily see not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme".

To the same effect is another decision of the Supreme Court in the case of *Kavalappara Kottarathil Kochini v. State of Madras*,<sup>3</sup> it was said: "There must, therefore, be harmonious balancing between the fundamental rights declared by Art. 19 (1) and the social control permitted by Art. 19 (5). It is implicit in the nature of restrictions that no inflexible standard can be laid down: each case must be decided on its facts."

The Supreme Court in *Narendra Kumar v. Union of India*,<sup>4</sup> observed: "In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public".

"The test for ascertaining reasonableness of the restriction on the rights guaranteed under Art. 19 to be determined by a reference to the nature of the right said to have been infringed the purpose of the restrictions sought to be imposed, the urgency of the evil and the necessity to rectify or remedy it—all of which has to be balanced with the social welfare of social purpose sought to be achieved. The right of the individual has therefore to be sublimated to the larger interest of the general public."<sup>5</sup>

Another test formulated by the Supreme Court is that there must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. In other words, the Court has to see whether by virtue of the restriction imposed on the right of the citizen the object of the statute is really fulfilled or frustrated. If there is a

1. 1958 SC 731 (744).

2. 1959 SC 1124 (1132).

3. 1960 SC 1080 (1099).

4. 1960 SC 430.

5. *Bachan Singh v. State of Punjab*, 1971 SC 2164 (2169).

direct nexus between the restriction and the object of the Act then strong presumption in favour of the constitutionality of the Act will naturally arise.<sup>1</sup>

In the case of *K. K. Kochuni v. State of Madras*,<sup>2</sup> the Supreme Court has observed : "But the restrictions sought to be imposed shall not be arbitrary, but must have reasonable relation to the object sought to be achieved and shall be in the interests of the general public."

Same view was taken by this Court in the case of *O. K. Ghosh v. E. X. Joseph*,<sup>3</sup> where Gajendragadkar, J. speaking for this court observed as follows : "A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression "in the interest of public order".

Another test of reasonableness of restrictions is the prevailing social values whose needs are satisfied by restrictions meant to protect social welfare. In the case of *State of Uttar Pradesh v. Kaushalaya*,<sup>4</sup> the Supreme Court while relying on one of its earlier decisions in the case of *State of Madras v. V. G. Row*,<sup>5</sup> observed as follows : "The reasonableness of a restriction depends upon the value of life in a society, the circumstances obtaining at a particular point of time when the restriction is imposed, the degree and the urgency of the evil sought to be controlled and similar others".

We have deliberately not referred to the American cases because the conditions in our country are quite different and the Supreme Court need not rely on the American Constitution for the purpose of examining the seven freedoms contained in Art. 19 because the social conditions and the habits of our people are different. In this connection, in the case of *Jagnathan Singh v. State of U. P.*,<sup>6</sup> the Supreme Court observed as follows : "So far as we are concerned in this country, we do not have, in our Constitution any provision like the English Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply 'the due process clause'.

Another important test which has been enunciated by the Supreme Court is that so far as the nature of reasonableness is concerned it has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Courts must see whether the social control envisaged in clause (6) of Art. 19 is being effectuated by the restrictions imposed on the fundamental right. It is obvious that if the Courts look at the restrictions only from the point of view of the citizen who is affected it will not be a correct or safe approach inasmuch as the restriction is bound to be irksome and painful to the citizen even though it may be for the public good. Therefore, a just balance must be struck in relation to the restriction and the public good

1. *Pathumma v. State of Kerala*, 1978 SC 771 (778).

2. 1960 SC 1080.

3. 1963 SC 812 (814).

4. 1964 SC 416 (422).

5. 1952 SC 196.

6. 1973 SC 947 (952).



that is done to the people at large. It is obvious that, however important the right of a citizen or an individual may be, it has to yield to the larger interests of the country or the community. In the case of *Joti Pershad v. Administrator for the Union Territory of Delhi*,<sup>1</sup> the Court observed as follows : "Where the legislature fulfils its purpose and enacts laws, which in its wisdom, are considered necessary for the solution of what after all is a very human problem the tests of "reasonableness" have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and particularly in judging of their validity the courts have necessarily to approach it from the point of view of furthering the social interests which it is the purpose of the legislation to promote, for the Courts are not, in these matters, functioning as it were in vacuo, but as parts of a society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole."

It has also been held by the Supreme Court that in judging reasonableness of restrictions the Court is fully entitled to take into considerations the matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of legislation. In this connection, in the case of *Mohd. Hanif Qureshi v. State of Bihar*,<sup>2</sup> the court observed as follows : "It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matter of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation "

#### *Discretionary exercise of power playing restrictions.*

The power to issue orders or directions from time to time is conferred on the Central or State Government which is undoubtedly a very high authority and must be presumed to act in a just and reasonable manner. This point is well settled and concluded by several decisions of the Supreme Court. In *Chinta Lingam v. Government of India*,<sup>3</sup> the Supreme Court made the following observations :

"At any rate it has been pointed out in more than one decision of this Court that when the power has to be exercised by one of the highest officers the fact that no appeal has been provided for is a matter of no comment. It was said that though the power was discretionary but it was not necessarily discriminatory and abuse of power could not be easily assumed. There was moreover a presumption that public officials would discharge their duties honestly and in accordance with rules of law".

This case was followed in *V. C. Shukla v. State of Delhi Admn.*<sup>4</sup> where Fazal Ali, J. speaking for the Court observed as follows :

"Furthermore, as the power is vested in a very high authority, it cannot be assumed that it is likely to be abused. On the other hand, where the power

1. 1961 SC 1602 (1613).

2. 1958 SC 731 (741).

3. (1970) 3 SCC 768 : (1971) 2 SCR 871; *Laxmi Khandwari v. State of U. P.* (1981) 2 SCC 600 (621)

4. (1980) Supp SCC 249 : (1980) SCC (Cri) 849.

is conferred on such a high authority as the Central Government, the presumption will be that the power will be exercised in a *bona fide* manner and according to law.<sup>2</sup>

### *Restraints not to be excessive.*

One of the tests that has been laid down to determine the reasonableness of a restriction is to find out if the restraint is more excessive than that warranted by the situation. In the instant case, taking an overall picture of the history of sugar production it cannot be said that the stoppage of sugar crushers for a short period is more excessive than the situation demanded.<sup>3</sup>

In *Madhya Bharat Cotton Association Ltd. v. Union of India*,<sup>3</sup> while considering a restriction imposed for a short time, the Supreme Court observed as follows :

“Further, cotton being a commodity essential to the life of the community, it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in the commodity. Accordingly, Clause 4 of the Cotton Control Order of 1950 was held not to offend Article 19 (1) (g) of the Constitution because sub-clause (5) validated it.”

### *Restrictions.*

Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable.<sup>4</sup> In *Mohammad Yasin v. Town Area Committee Jalalabad*,<sup>5</sup> the Supreme Court observed that under Article 19 (1) (g) of the Constitution a citizen has the right to carry on any occupation, trade or business and the only restriction on this right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in Clause (6) of that Article as amended by the Constitution (First Amendment) Act, 1951. In *Mohammad Yasin's case*,<sup>6</sup> by the bye-laws of the Municipal Committee, it was provided that no person shall sell or purchase any vegetables or fruit within the limits of the municipal area of Jalalabad, wholesale or by auction, without paying the prescribed fee. It was urged on behalf of a wholesale dealer in vegetables that although there was no prohibition against carrying on business in vegetables by anybody, in effect the bye-laws brought about a total stoppage of the wholesaler's business in a commercial sense, for he had to pay prescribed fee to the contractor, and under the bye-laws the wholesale dealer could not charge a higher rate of commission than the contractor. The wholesale dealer, therefore, could charge the growers of vegetables and fruit only the commission permissible under the bye-laws, and he had to make over the entire commission to the contractor without retaining any part thereof. The wholesale dealer was thereby converted into a mere tax-collector for the contractor or the Town Area Committee without any

1. *Ibid* : *Laxmi Khandsari v. State of U. P.*, (1981) 2 SCC 600 (621-22).

2. *Laxmi Khandsari v. State of U. P.*, (1981) 2 SCC 600 (620).

3. 1954 SC 634.

4. *R. C. Cooper v. Union of India*, 1970 SC 564 (601).

5. 1952 SC 115.

6. *Ibid*.

remuneration. The bye-laws in this situation were struck down as impairing the freedom to carry on business.

Another aspect of unguided power to affect the citizen's fundamental rights lies in the province of Art. 19 since imposition of unreasonable restrictions on the right to carry on business is violative of Art. 19 (1) (g).

The Supreme Court in *R.M. Shesadri*,<sup>1</sup> dealt with restrictions on showing of films by theatre owners and having held them unreasonable struck down the provisions. Similarly, in *Harichand*<sup>2</sup> restriction on the right to trade was struck down because the regulation concerned provided no principle, nor contained any policy. The Court held:

"A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation is one such provision and is therefore liable to be struck down as violative of Art. 19 (1) (g)."

*When restrictions held unreasonable.*

Art. 19 (1) (g) guarantees to the Indian citizen the right to carry on trade business, subject to such reasonable restrictions as are mentioned in clause 6. In *Rashid Ahmad v. Municipal Board*,<sup>3</sup> bye law 2 provided that no person shall establish a market for wholesale transactions in vegetables except with the permission of the Board. There was no bye-law authorising the Board to issue the licence. Acting upon and other bye-law the Board granted monopoly to Hanif Ahmad and put it out of its power to grant licence to petitioner to carry on wholesale business in vegetables either at the fixed market place or at any other place within the Municipal limits. This, the Supreme Court held was much more than reasonable restriction on the petitioner and that being the position, the bye-law was void. There being no bye law requiring the petitioner to take out licence there could be no justification for the Board to stop the petitioner's business or to prosecute him.

*Judicial Review.*

In adjudging the reasonableness of the restrictions imposed by the exercise of power on the fundamental rights of the citizens, absence of a provision for judicial review and of machinery for obtaining an order recalling or amending the order made in exercise of that power have to be given due weight :<sup>4</sup>

A doctrinaire approach should not be made but care should be taken to see that the real purpose which is sought to be achieved by restricting the rights of the citizens is subserved. At the same time, the possibility of an alternative scheme which might have been but has not been enforced would not expose the restrictions to challenge on the ground that they are not reasonable."<sup>5</sup> Judged in that light and on an overall consideration of the various aspects of the matter, restrictions put by the impugned order in the above case could

1. 1954 SC 747.

2. 1967 SC 829 (834).

3. 1950 SC 163.

4. *Virendra v. State of Punjab*, 1958 SCR 308 : 1957 SC 896 ; *State of Bihar v. K. K. Misra*, 1971 SC 1667 (1670).

5. *Laxmi Khandsari v. State of U. P.*, 1981 SC 873 (881).

not by no means be said to be unreasonable. It was only regulatory and not prohibitory.

In *Narendra Kumar v. Union of India*,<sup>1</sup> the Supreme Court pointed out that in applying the test of reasonableness, the Court has to consider the question in the background of facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interest of the general public. The reasonableness has got to be tested both from the procedural and substantive aspects of the law.

Similarly, as held by the Supreme Court in *Cooverjee B. Bharucha v. Excise Commissioner and another*,<sup>2</sup> *Narendra Kumar v. Union of India*,<sup>3</sup> total prohibition of business is possible by putting reasonable restrictions within the meaning of Article 19 (6) on the right to carry on the business.

#### 23.74. Restriction and Prohibition.

In *Narendra Kumar v. Union of India*,<sup>4</sup> it was contended that the prohibition of the exercise of a right must be distinguished from restriction on the exercise of a right, and when the Constitution spoke of laws imposing reasonable restrictions on the exercise of rights it did not save laws which prohibited the exercise of any such right. It was urged that the total elimination of the dealer amounting as it did to prohibition of any exercise of the right to carry on trade would therefore be in any case outside the saving provisions of Cls. 5 and 6 of Art. 19.

In *Chintaman Rao v. State of Madhya Pradesh*,<sup>5</sup> the constitutionality of the Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural purposes) Act came up for consideration and Mahajan, J. delivering the judgment of the Court, after pointing out that the question was whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounted to a reasonable restriction of the fundamental rights mentioned in Art. 19 (1)(g) of the Constitution based his decision that the impugned law did not come within the saving provisions of Art. 19 (6) of the Constitution on the view that the test of reasonableness was not satisfied and not on a view that "prohibition" went beyond "restriction".

The law was struck down because the restriction in that case amounting to prohibition was not reasonable and not because it was a prohibition.

In *Saghir Ahmad v. State of U. P.*<sup>6</sup> and in *State of Bombay v. Chamarbaugwala*,<sup>7</sup> the question whether prohibition of the exercise of a right was

1. 1960 SC 430 (437).

2. 1954 SC 220.

3. 1960 SC 430.

4. *Ibid.*

5. 1951 SC 118 ; *Narendra Kumar v. Union of India*, 1960 SC 430 (435).

6. 1954 SC 728.

7. 1957 SC 699.

within the meaning of restrictions raised but the Court decided to express no final opinion in the matter and left the question open. In *Cooverjee Bharucha v. Excise Commr. and the Chief Commr., Ajmer*<sup>1</sup> the Court extended the provisions of Clause 6 of Art. 19 to a law which had the effect of prohibiting the exercise of a right to carry on trade to many citizens. Mahajan, J. delivering the judgment of the Court observed : "In order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important factor in deciding the reasonableness of the restrictions."

In *Madhya Bharat Cotton Association Ltd. v. Union of India*,<sup>2</sup> the Court had to consider the constitutionality of an order which in effect prohibited a large section of traders from carrying on their normal trade in forward contracts. In holding the order to be valid, Bose, J., delivering the judgment of the Court said : "Cotton being a commodity essential to the life of the community, it is reasonable to have restrictions which may, in certain circumstances extend to total prohibition for a time of all normal trading in the commodity."

In these three cases viz., *Chintaman Rao's case*,<sup>3</sup> *Cooverjee's*<sup>4</sup> case, and *M. B. Cotton Association Ltd. case*,<sup>5</sup> the Court considered the real question as to whether the interference with the fundamental right was "reasonable" or not in the interest of the general public and that if the answer to the question was in the affirmative, the law would be valid and it would be invalid if the test of reasonableness was not passed. Prohibition was in all these cases treated as only a kind of "restriction". Any other view would, defeat the intention of the Constitution. .

It was observed by Mathew, J. in *G. K. Krishan v. State of Tamil Nadu*<sup>6</sup> "The word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied". In modern statutes concerned as they are with economic and social activities, 'regulation' must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in *Commonwealth of Australia v. Bank of New South Wales*<sup>7</sup> and we agree with what was stated therein—that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal or political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to

1. 1954 SC 220.

2. 1954 SC 634.

3. 1951 SC 118.

4. 1954 SC 220.

5. 1954 SC 634.

6. 1975 SC 853. : *State of Tamil Nadu v. Hind Stone*, (1981) 2 SCC 205 (217).

7. (1949) 2 All. ER 755.

create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The statute with which we are concerned, the Mines and Minerals (Development and Regulation) Act, is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."<sup>1</sup>

### 23.75. Hoarding and Black marketing

A person has a right to carry on any occupation, trade or business and the only restriction on this unfettered right is the authority of the State to make a law imposing reasonable restrictions under Cl. (6). The court in each case has to strike a proper balance between the freedom guaranteed by Art. 19 (1)(g) and the social control permitted by cl. (6) of Article 19.<sup>2</sup>

In *P.P. Enterprises v. Union of India*,<sup>3</sup> the Central Government had put an embargo on the dealers on keeping sugar in excess of the quantity specified. It was passed only with a view to prevent hoarding and black-marketing and to ensure equitable distribution and availability of sugar at fair prices in the open market.

It only sought to regulate the limit of storage of sugar and did not prohibit its storage. The order was held to be valid.

### 23.76. Industries

List I, Entry 52 runs as follows :—"Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest." In List II the entry relating to industries is Entry 24 which is as follows : Industries subject to the provisions of Entries 7 and 52 of List I."<sup>4</sup>

A reading of Entry 52 in List I and Entry 24 in List II makes it clear that the Parliament will have exclusive jurisdiction to legislate regarding industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Connected with these two entries is Entry 33, List III Concurrent List which provides : "Trade and commerce in, and the production, supply and distribution —

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products ;

(b) to (e)     x     x     x"

The subject of trade and the production, supply and distribution of the products of any industry which has been declared by Parliament under Item I,

1. *State of Tamil Nadu v. Hind Stone*, (1911) 2 SCC 255 (217).

2. *P. P. Enterprises v. Union of India*, 1982 SC 1016 (1019).

3. 1982 SC 1016 (1019).

4. *State of U P. v. Synthetics and Chemicals Ltd.*, 1980 SC 614 (620).

Entry 52 is in the Concurrent List on which both Parliament and State can legislate.

The Industries (Development and Regulation) Act, 1951 was enacted by Parliament to provide for development and regulation of certain industries.

If the powers of Parliament and the State Legislature were confined to Entry 52 in List I and the Entry 24 in List II, Parliament would have had exclusive power to legislate in respect of industries notified by Parliament. The power of the State under Entry 24, List II is subject to the provisions of Entry 52 in List I. But we have to take into account Entry 26 in List II and Entry 33 in List III for determining the scope of legislative power of the Parliament and the State, Entry 26 in List II is as follows:—"Trade and Commerce within the State subject to the provisions of Entry 33 of List III."

Under Entry 33, List III the Parliament and the State have concurrent powers to legislate regarding the production, supply and distribution of the products of industries notified by the Parliament. A fair scrutiny of the relevant entries, makes it clear that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as List II Entry 33 in the concurrent List enables a law to be made regarding production, supply, distribution of products of a notified industry.

In *Tika Ramji v. State of Uttar Pradesh*,<sup>1</sup> a question arose whether Sugarcane Regulation, Supply and Purchase Act passed by the State Legislature and the notification issued therein by the State Government were repugnant to the notifications made under the Industries (Development and Regulation) Act of 1951. Two notifications were issued by the State Government under the U. P. Sugarcane Regulations Supply and Purchase Act, 1953, prohibiting the occupier of the factory to which area is assigned from entering into an agreement to purchase cane except through a Cane Growers Co-operative Society under certain circumstances and assigning different sugarcane factories specified to certain purchase centres for supply to them sugarcane for the crushing season, were challenged as *ultra vires*. The plea was that the subject-matter of the legislation fell within the exclusive jurisdiction of Parliament and the impugned notifications were repugnant to the notifications made under the Industries (Development and Regulation) Act, 1951. On 31st October, 1951, Parliament enacted the Industries (Development and Regulation) Act, 1951 to provide for development and regulation of certain industries. By S. 2 of the Act it was declared that it was expedient in public interest that the State should take in its control the industries specified in the First Schedule which included in Item 5 thereof, the industries engaged in the manufacture or production of sugarcane. Industries (Development and Regulation) Act, 1951 was amended by Act 26 of 1953 by adding Chap. III-A entrusting Central Government with power so far as it appears necessary or expedient for securing the equitable distribution and availability at fair price of any article relating to scheduled industry to provide by notified order for regulation, supply and distribution and trade and commerce thereof. The impugned notification which required the factories to purchase their sugarcane from the cooperative societies and assigned certain areas for factories as cane purchasing centre for the factories was stated to be *ultra vires* as they were beyond the State's competence and covered by the notification under the Industries (Development and Regulation) Act. Justice Bhagwati, observed: "When, however, it came to the products of the controlled industries comprised in Entry 52 of List I, trade and commerce in, and production, supply

and distribution of, these goods became the subject-matter of Entry 33 of List III and both Parliament and the State Legislatures had jurisdiction to legislate in regard thereto." The learned Judge proceeded to observe—"That sugarcane being goods which fell directly under Entry 27 of List II and was within the exclusive jurisdiction of the State Legislature and it was competent to legislate with regard to it and as such the impugned Act was *intra-vires* of the State Legislature. The power to legislate regarding production, supply and distribution of good is subject to provision in Entry 33, List III which deals with products and industries notified by Parliament. Entry 33 being in the Concurrent List, legislative power of the State regarding production, supply and distribution of goods cannot be denied."

In *Baijnath Kedia v. State of Bihar*,<sup>1</sup> a question arose as to whether the Bihar Legislature had jurisdiction to enact the second proviso to S. 10 (2) of the Bihar Land Reforms Act, 1950, by which the terms and conditions of the lease of mines and minerals could be substituted for the terms and conditions laid down in the Bihar Mines and Minerals Concession Rules. On the strength of the amended S. 10 (2) of the Reforms Act and amended R. 20 the Bihar Government demanded from the appellant rent contrary to the terms of his lease. It was held that Entry 54 in Union List speaks of requirements of mines and minerals development and Entry 23 in List II is subject to Entry 54. Once a declaration was made under Entry 54 specifying the extent of vesting the competency was only with the Parliament.

The plea of the learned counsel was that the modification of the existing lease was a separate topic and not covered by S. 15 of Act 67 of 1957. The Court rejected the plea on the ground that the entire legislative field in relating to mines and minerals had been withdrawn from the State Legislature. The decision does not help the appellants for on the facts it is clear that the entire field relating to mines and minerals had been occupied and taken away from the Legislature and as such it was beyond the competence of the State to legislate on mines and minerals.

### 23.77. *Right to Close down business.*

We may consider the nature of the right to close down the business. If one does not start the business at all, then under no circumstances he can be compelled to start one. Such a negative aspect of a right to carry on a business may be equated with the negative aspects of the right embedded in the concept of the right to freedom of speech, to form an association or to acquire or hold property. Under no circumstances a person can be compelled to speak, to form an association or to acquire or held a property.

The Supreme Court, in *Hathi Singh Manufacturing Company v. Union of India*<sup>2</sup> pointed out that the right to carry on any business includes a right to start, carry on or close down any undertaking but it is not correct to say that the right to close down a business can be equalled or placed at par as high as the right not to start and carry on a business at all. In *Excel Wear v. Union of India*,<sup>3</sup> the Supreme Court held that the proposition urged on behalf of the employers by equating the two rights and placing them at part is not quite opposite and sound and equally so the extreme contention put forward on behalf of the labour union

1. (1970) SCR 100 : 1970 SC 1436.

2. 1960 SC 973.

3. 1979 SC 25.



that right to close down a business is not an integral part of the right to carry on a business. It is wrong to say that an employer has no right to close down his business once he starts it. If he has such a right, as obviously he has, it cannot but be a fundamental right embedded in the right to carry on any business guaranteed under Article 19 (1) (g) of the Constitution. But such a right to close down a business is not absolute in its scope. It can certainly be restricted, regulated or controlled by law in the interest of the general public.<sup>1</sup>

In *R.C. Cooper v. Union of India*,<sup>2</sup> the Court held the statute to be void for infringing the rights under Articles 19 (1) (f) and 19 (1) (g) of the Constitution. In the *Bank Nationalisation*<sup>3</sup> case (supra) the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the *Bank Nationalisation* case (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. The individual right is not lost by reason of the fact that he is a shareholder of the company. The *Bank Nationalisation* case (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of shareholders with regard to Article 19 (1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised through their newspapers through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent the Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The locus standi of the shareholder-petitioners is beyond challenge after the ruling of the Supreme Court in the *Bank Nationalisation* case (supra). The presence of the company is on the same ruling not a bar to the grant of relief.<sup>4</sup>

### 23.78. Price Fixation—Legislative function.

"Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price. Nevertheless, the criterion adopted must be reasonable. Reasonableness, for purposes of judging whether there was an "excess of power" or an "arbitrary" exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power."<sup>5</sup>

Possibility of an alternative scheme which might have been but had not been designed, would not be sufficient to make a restriction unreasonable. In

1. *Exell Wear v. Union of India*, 1979 SC 25 (35).

2. 1970 SC 564.

3. *R. C. Cooper v. Union of India*, 1970 SC 564.

4. *Bennett Coleman & Co. v. Union of India*, 1973 SC 106 (114).

5. *Saraswati Industrial Syndicate* 1975 SC 460, *Laxmi Khandsari v. State of U. P.*, (1981) 2 SCC 602 (629).

*State of Maharashtra v. Mumbai Upnagar Gramodyog Sangh*<sup>1</sup> the Supreme Court observed :

"The legislature has designed by which reasonable restrictions are placed upon the right of a citizen to dispose of his property ; possibility of an alternative scheme which might have been but has not been designed, will not justifiably expose the first scheme to the attack that it imposes unreasonable restrictions."

In earlier cases the Supreme Court approved the view that in fixation of prices among the factors to be considered was a reasonable and fair margin of profits for the producer.<sup>2</sup>

Clause 5 of the Sugar Control Order of 1955 laid down the factors which had to be taken into consideration in fixing prices. These factors include among other things a reasonable margin of profit for the producer and/or trade and any incidental charges. This was kept in mind when prices were fixed by the impugned notification. These prices were prevalent in the free market and must certainly have taken account of a fair margin of profit for the producer, though in the case of an individual factory due to factors for which the producer might himself be responsible, the cost of production might have been a little more. Therefore, the prices fixed by the Government by the impugned notification can in no circumstances be said to have been proved to be below the cost of production."<sup>3</sup>

The *Panipath Co-operative Sugar Mill's*<sup>4</sup> case the price fixation of sugar under the Sugar (Price Determination) Order, 1971, on principles laid down by Tariff Commission and other expert bodies were considered by the Court. In that context it was said:

"We are, satisfied both on the language of the sub-section, the background in which it was enacted and the mischief the legislature sought to remedy through its working that the true construction is that a fair price has to be determined in respect of the entire produce, ensuring to the industry a reasonable return on the capital employed in the business of manufacturing sugar. But this does not mean that Government can fix an arbitrary price, or a price fixed on extraneous considerations or such that it does not secure a reasonable return on the capital employed in the industry."

#### *Price Fixation—Fair Price*

Reasonableness, for purposes of judging whether there was an excess of power 'or an arbitrary' exercise of it is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power. This was made clear by the Supreme Court in several cases, *Shree Meenakshi Mills Ltd. v. Union of India*<sup>5</sup>, *Panipat Co-operative Sugar Mills v. Union of India*.<sup>6</sup>

*Shree Meenakshi Mill's* case related to price fixation under the provisions of Cotton Textile (Control) Order, 1948. There, the Supreme Court observed, *inter alia*, that the case of *Premier Automobiles Ltd. v. Union of India*.<sup>7</sup>

1. 1970 SC 1157.

2. *Divan Sugar & General Mills v. Union of India*, 1959 SC 626.

3. *Laxmi Khandasari v. State of U. P.*, (1981) 2 SCC 600 (612-13).

4. 1973 SC 537: *Saraswati Industrial Syndicate v. Union of India*, 1975 SC 460

5. 1974 SC 366.

6. 1973 SC 537, *Saraswati Industrial Syndicate v. Union of India*, 1975 SC 460.

7. 1972 SC 1690 : (1972) 2 SCR 526.

did not consider that concept of fair prices varied with circumstances in which and the purposes for which the price control was sought to be imposed", and, it indicated that the decision in that case was based on a "special agreement" involved there.

The Supreme Court later changed its view, and it said that : "The question of fair price to the consumer with reference to the dominant object and purpose of the legislation claiming equitable distribution and availability at fair price is completely lost sight of, if profit and the producer's return are kept in the forefront. In determining the reasonableness of a restriction imposed by law in the field of industry, trade or commerce, it has to be remembered that the mere fact that some of those who are engaged in these are alleging loss after the imposition of law will not render the law unreasonable. By its very nature, industry or trade or commerce goes through periods of prosperity and adversity on account of economic and sometimes social and political factors. In a largely free economy when controls have to be introduced to ensure availability of consumer goods like foodstuff, cloth and the like at a fair price it is an impracticable proposition to require the Government to go through the exercise like that of a Commission to fix the prices."<sup>1</sup>

#### 20.79. Price Control

The balance between freedom to carry on business and special control under reasonable restrictions is required. In *Dwarka Prasad Laxmi Narain v. State of U. P.*<sup>2</sup> the exclusion of incidental charges from the cost items for allowing 10 per cent profit in fixing the controlled prices of coal was attacked to be unfair and discriminatory. The Supreme Court held that the commission would only lower the margin of profit, and the fixation of price was in the interest of public.

In deciding the nature and extent of the guidance which should be given to the delegate, legislature must inevitably take into account the special features of the object which it intends to achieve by a particular statute. The object which was intended to be achieved and the means which were required to be adopted in the achievement of the said object should been clearly enumerated by the Legislature as a matter of legislative decision. Whether or not some other matters also should been included in the legislative decision must be left to the legislature itself. The question which is to be considered is whether the power conferred on the delegate is uncanalised or unguided. Having regard to the nature of the problem which the Legislature wanted to attack it may come to the conclusion that it would be inexpedient to limit the discretion of the delegate in fixing the maximum prices by reference to any basic price.<sup>3</sup>

In the case of *Dwarka Prasad Laxmi Narain*<sup>4</sup> the provision of clause 4 (3) of the Uttar Pradesh Coal Control Order, 1953, was held to be void as imposing an unreasonable restriction upon the freedom of trade and business guaranteed under Art. 19 (1) (g) of the Constitution, and not coming within the protection afforded by clause (6) of Article 19. The impugned clause, it was held, had conferred on the licensing authority unrestricted power without framing any rules or issuing any directions to regulate or guide his discretion. Besides the power could be exercised not only by the State Coal Controller

1. *Shree Meenakshi Mill v. Union of India*, 1974 SC 366 (380).

2. 1954 SC 224.

3. *Union of India v. Bhanamal Gulzarimal Ltd.*, 1960 SC 475 (48-9).

4. 1954 SCR 803 : 1954 SC 224.

but by any person to whom he may choose to delegate the same and it was observed that the choice can be made in favour of any and every person.

In the case of *Nath Mal*,<sup>1</sup> the Supreme Court struck down the latter part of clause 25 of the Rajasthan Foodgrains Control Order, 1949. In this case the challenge to the impugned clause proceeded on the specific and express assumption that Section 3 of the impugned clause empowered the Government to requisition the stock at a price lower than the selling price thus causing loss to the persons whose stocks were freezed while at the same time the Government was free to sell the same stocks at a higher price and make a profit.<sup>2</sup>

### *Freezing of Stocks.*

In *Nath Mal and Mitha Mal* case,<sup>3</sup> while dealing with food grains, an order freezing the stocks in order to secure its equitable distribution so as to make it available at a fair price to consumers was upheld by this Court with the following observation : "We are clear, that the freezing of stocks of foodgrains is reasonably related to the object which the Act was intended to achieve, namely, to secure the equitable distribution and availability at fair prices and to regulate transport, distribution, disposal and acquisition of an essential commodity such as foodgrains."

Even the freezing of stocks and foodgrains with a view to securing their equitable distribution and availability was held to be a reasonable restriction. If by seizing the food stocks the right of a citizen to trade in food grains was seriously impaired and hampered yet such a State action was justified on the ground of public interest.<sup>4</sup>

In *Prag Ice & Oil Mills v. Union of India*,<sup>5</sup> Beg. C. J., observed : "All the tests of validity of the impugned price control or fixation order were to be found in Section 3 of Essential at Commodities Act. Section 3 makes necessity or expediency of a control order for the purpose of maintaining or increasing supplies of an essential commodity or for securing its equitable distribution at fair prices the criteria of validity. It is evident that an assessment of either the expediency or necessity of a measure, in the light of all the facts and circumstances which have a bearing on the subject of price fixation, is essentially a subjective matter. It is true that objective criteria may enter into determinations of particular selling prices of each kilogram of mustard oil at various times. But, there is no obligation here to fix the price in such a way as to ensure reasonable profits to the producer or manufacturer. It has also to be remembered that the object is to secure equitable distribution and availability at fair prices so that it is the interest of the consumer and not of the producer which is the determining factor in applying any objective tests at any particular time."<sup>6</sup>

The various measures which are challenged as unreasonable namely, the provisions for canteens, rest rooms, facilities for supply of drinking water,

1. 1954 SCR 982 : 1954 SC 307.

2. *Harishnker Bagia v. State of Madhya Pradesh*, 1954 SC 465.

3. 1954 SC 307.

4. *Laxmi Khandhari v. State of U. P.*, (1981) 2 SCC 600 (613).

5. (1978) 3 SCC 459 : (1978) 3 SCR 293; 1978 SC 1296.

6. *Laxmi Khandhari v. State of U. P.*, (1981) 2 SCC 600 (614); *Prag Ice & Oil Mills v. Union of India*, 1978 SC 1276.

latrines, urinals, first-aid facilities are amenities for the dignity of human labour. The measure is in the interest of the public. It is for the legislature to determine what is needed as the appropriate conditions for employment of contract labour. It is difficult for the Court to impose its own standards of reasonableness. The legislature will be guided by the needs of the general public in determining the reasonableness of such requirements.<sup>1</sup>

In *Sri Krishna Rice Mills* case, Civil Appeal Nos. 1026-1031 of 1963, dated 27.1.1965 (SC) the rice was procured after 30 December, 1957 at the rate of maximum price fixed by the Government by notification dated 30 December, 1957. The appellants there contended that they had paid higher prices than fixed by the notification. This Court held that unless it could be shown that the reduction of price was not fair, it could not be said that the procurement after 30 December, 1957 based on the price fixed in the notification of that date was in any manner against the provisions of the Act or was hit by Article 19 (1) (f). The Court found that the prices fixed were fair, because the reason for the reduction of prices of December, 1957 was that new crop came into the market from November, 1957 and the market prices of rice fell. When prices fall, traders who had made purchases at higher prices have to sell at the reduced rates and therefore, they cannot complain of rise and fall of prices due to economic factors in an open market they cannot similarly complain of increase or reduction of prices as a result of notification under Section 3 (1) of the Essential Commodities Act, 1955 because that increase or reduction is also based on economic factors.<sup>2</sup>

In *State of Rajasthan v. Nathmal*,<sup>3</sup> the authorities were allowed to freeze any stock of foodgrains and no person could dispose of any foodgrains out of the stock so "frozen" without the permission of the authority. The order was held to be relatable to the object of the Act, namely securing equitable distribution and availability at fair prices. The ceiling price of the commodity was Rupees 17-18. The Government procurement price was Rs. 9 per maund. The Court held that it was an unreasonable restriction because the Government was free to sell at a higher price and make a profit. The ceiling price was higher than the fixed price at which the stocks were requisitioned but after requisition, the Government would sell at the higher price. Therefore, that was an unreasonable restriction.

In *Narendra Kumar v. Union of India*,<sup>4</sup> this Court emphasised that the test of reasonableness meant the nature of evil that was sought to be remedied, that ratio of the harm caused to the individual citizen by the proposed remedy and the beneficial effect reasonably expected to result to the general public.

The Court held that the evil sought to be remedied was rise in price and some fixation of price being essential to keep prices within reasonable limits was reasonable restriction.

### 23.80. Loss to Producer.

It was contended that in fixation of the price of levy sugar the Government had not taken into consideration the fact that the petitioners would undergo a serious loss because the price would not be sufficient even to cover their manufacturing cost. But the Supreme Court did not accept this argument "The policy of price control has for its dominant object equitable

1. *Gamman India Ltd., v. Union of India*, 1974 SC 960 (1965).

2. *Shree Meenakshi Mills v. Union of India*, 1974 SC 366 (1979).

3. 1954 SC 307.

4. 1960 SC 430.

distribution and availability of the commodity at fair price so as to benefit the consumers. It is manifest that individual interests, however, precious they may be must yield to the larger interest of the community namely, in the instant case, the large body of the consumers of sugar. In fact, even if the petitioners have to bear some loss there can be no question of the restrictions imposed on the petitioners being unreasonable.<sup>1</sup>

In the case of essential commodities like sugar the question of the economic production and distribution thereof must enter the verdict of the Court in deciding the reasonableness of the restrictions. In such cases even if the margin of profit left to the producer is slashed that would not make the restriction unreasonable.<sup>2</sup>

In *Shree Meenakshi Mills Ltd. v. Union of India*,<sup>3</sup> Ray, C. J. speaking for the Court observed as follows :

“If fair price is to be fixed leaving a reasonable margin of profit, there is never any question of infringement of fundamental right to carry on business by imposing reasonable restrictions. The question of fair price to the consumer with reference to the dominant object and purpose of the legislation claiming equitable distribution and availability at fair price is completely lost sight of if profit and the producer's return are kept in the forefront.”

In *Lakshmi Khandsari v. State of U. P.*<sup>4</sup> the Supreme Court was satisfied that the restriction imposed by the impugned notification in stopping the crushers for the period 10th October to 1st December, 1980 was in public interest and bore a reasonable nexus to the object which was sought to be achieved, namely, to reduce shortage of sugar and ensure a more equitable distribution of that commodity.

In *Prag Ice & Oil Mills v. Union of India*<sup>5</sup> Chandrachud, C. J., observed as follows :

“The dominant purposes of these provisions is to ensure the availability of essential commodities to the consumers at a fair price. And though patent injustice to the producer is not to be encouraged, a reasonable return on investment or a reasonable rate of profit is not the *sine question* of the validity of action taken in furtherance of the powers conferred by Section 3 (1) and Section 3 (2) (c) of the Essential Commodities Act. The interest of the consumer has to be kept in the forefront and the prime consideration that an essential commodity ought to be made available to the common man at a fair price must rank in priority over every other consideration.”<sup>6</sup>

Where the fixation of price of an essential commodity is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction can not be challenged as unreasonable on the ground that it would result in the elimination of middleman for whom it would be unprofitable to carry on business at fixed rate or that it does not ensure a reasonable return to the manufacturer or producer on the capital employed in the business of manufacturing or producing such an essential commodity.<sup>7</sup>

1. *New India Sugar Works v. State of U. P.*, 1981 SC 998 (1000).
2. *Ibid.*
3. (1974) 2 SCR 398 : 1974 SC 366.
4. *Laxmi Khandsari v. State of U. P.*, (1981) 2 SCC 600 (627).
5. 1978 SC 1296.
6. *Laxmi Khandsari v. State of U. P.*, (1981) 2 SCC 600 (628).
7. *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, 1983 SC 1019 (1032).

**23.81. Price Permits.**

Where the evil sought to be remedied by the law is the rise on prices of raw material which is bound to be reflected in the higher prices of the consumer goods in the production of which that raw material forms an ingredient, an Order controlling its price would of course be the first obvious step for fighting this evil.

The essential subsidiary step is in some cases to introduce a system of permits so that the persons acquiring a particular article could be known. A system of permits would also be of great help in ensuring that the raw material would go to those industries where it is needed most and distributed in such quantities to several industries in different parts of the country as would procure the greatest benefit to the general public.<sup>1</sup>

**23.82. Price Fixation—A guideline.**

Although the object of a restriction may be beyond reach and may very well attract the protection of sub-arts. (1) to (6) of Art. 19, if the statute fails to provide sufficient safeguards against its misuse the operative sections will be rendered invalid.<sup>2</sup> A restriction imposed under Section 3 (1) of the Punjab Special Powers Act, 1956, was struck down by the Supreme Court in *Virendra v. State of Punjab*,<sup>3</sup> on the ground that the Act did not provide for any time for the operation of an order made thereunder nor for a representation by the aggrieved party.

The restriction impugned in *State of Bihar v. K. K. Misra*,<sup>4</sup> the power to impose the same was conferred on the executive Government and not to any judicial authority. There was no provision to make representation by the aggrieved party against the direction given by the Government: no appeal or revision was provided against that direction and the order made need not be of temporary nature. It was held that the impugned provision was violative of Articles 19 (1)(b), (c) and (d) and was not saved by Article 19 (3), (4) or (5).

**Price Control—Margin of Profit.**

In *Shree Meenakshi Mills Ltd. v. Union of India*,<sup>5</sup> the Supreme Court observed that if fair price was fixed leaving a reasonable margin of profit, there would never be any question of infringement of fundamental right to carry on business by imposing reasonable restrictions.

In determining the reasonableness of a restriction imposed by law in the field of industry, trade, commerce, it has to be remembered that the mere fact that some of those who are engaged in these are alleging loss after the imposition of law will not render the law unreasonable.<sup>6</sup>

Similar view was taken in the case of *Prag Ice & Oil Mills v. Union of India*,<sup>7</sup> where the court speaking through Beg, C. J., observed :

“It has also to be remembered that the object is to secure equitable distribution and availability at fair prices so that it is the interest of the

1. *Narendra Kumar v. Union of India*, (1960) 2 SCR 375 : 1960 SC 430 (436).
2. *State of Madhya Pradesh v. Baldeo Prasad*, (1961) 1 SCR 170 : 1961 SC 293.
3. 1958 SCR 308 : 1957 SC 896.
4. 1971 SC 1667, (1970).
5. 1974 SC 366.
6. *New India Sugar Works v. State of U. P.*, (1981) 2 SCC 293 (298)
7. 1978 SC 1296 ; *New India Sugar Works v. State of U. P.* (1981) 2 SCC 293.

consumer and not of the producer which is the determining factor in applying any objective tests at any particular time.

In *Diwan Sugar & General Mills v. Union of India*,<sup>1</sup> the Supreme Court considered Sugar Export Promotion Ordinance, 1958. Prices of sugar had gone up by a rupee per maund during May-June, 1951 in expectation of the Ordinance. Though the industry assured sale of sugar at prices prevalent before the Export policy was announced, there was no fall in prices. Notifications were issued under the Sugar Control Order fixing controlled price below the level of prices at the end of May and in the week preceding 17 June, 1958. This Supreme Court repelled the contention that the prices were below the cost of production. The sugar crushing season begins about the end of October and finished about the end of May. The fixation of prices in July, 1958 was on the basis of the 1957-58 season and the market prices were available at the time of the notification.

In an unreported decision in *Sri Krishna Rice Mills v. Joint Director (Food), Vijayawada* (Civil Appeals No. 1026-1031 etc. of 1963 D/- 27.1.1965 (SC)) the Supreme Court held that Section 3 of the Essential Commodities Act sufficiently specified the principles on the basis of which price should be fixed. The Central Government fixed the maximum price for sale of rice of certain quantities. The rice millers contended that notification fixing fair price violated Articles 14, 19 (1) (f), (g) and 31 (2) of the Constitution, and, therefore, they were entitled to the rates prevailing in the market. The contentions on Art. 19 (f) (g) were repelled on the rulings of the Supreme Court in *Hari Shanker Bagla v. State of Madhya Pradesh*<sup>2</sup> and *Union of India v. Bhanamal Gulzarimal*.<sup>3</sup>

In *Union of India v. Bhanamal Gulzarimal Ltd.*<sup>4</sup> clause 11B of the Iron and Steel (Control of Production and Distribution) Order, 1941, which conferred power on the Controller to fix maximum price from time to time was challenged on the ground that cl. 11B should have referred to the prices of some specified year as basic prices and should have directed the Controller to prescribe maximum prices by reference to the basic prices. This Court did not accept that contention. The special features of the object which the Control Order is said to achieve are an important consideration. Maximum prices in respect of iron and steel would depend on a rational evaluation from time to time of all factors. This Court will not substitute its determination for that of the direction of the authority in fixing the fair prices. The controller with a view to fixing maximum price of iron and steel made a flat reduction of Rs. 30/- per ton from the earlier maximum price. The price for sale by registered producers of untested articles was Rs. 333/- per ton whereas the price for sale by controlled stock holders was Rs. 363/- per ton and the price at which the respondents could sell was Rs. 378/- per ton; and as a result of per ton from of Rs. 30/- the respondents were required to sell at Rs. 348/- the deduction the controlled stock holders and they were compelled to sell at a reduced price. This Court held that losses in respect of particular transactions would not be decisive because the general effect of the notification is on all the classes of dealers as a whole.

"If it is shown that in a large majority of cases, if not all, the impugned notification would adversely affect the fundamental right of the dealers guaran-

1. 1959 SC 626 : *Shree Meenakshi v. Union of India*, 1974 SC 366 (378).

2. 1954 SC 465.

3. 1960SC 475

4. (1960) 2 SCR 627 : 1960 SC 475 : 1960 Cr. LJ 664.



teed under Article 19 (1) (f) and (g) that may constitute a serious infirmity in the validity of the notification."

In *Narendra Kumar v. Union of India*,<sup>1</sup> the Supreme Court emphasised that the test of reasonableness meant the nature of evil that was sought to be remedied, the ratio of the harm caused to the individual citizen by the proposed remedy and the beneficial effect reasonably expected to result to the general public. Clause 3 (1) of the Non-ferrous Metal Control Order 1958, which provided that no person shall sell or offer to sell any non-ferrous metal at a price which exceeds the amount represented by an addition of 3 1/2 per cent of its landed cost and which provided that no person shall purchase or offer to purchase from any person non-ferrous metal at a price higher than at which it is permissible for that other person to sell to him under sub-section (i) was challenged. The Court held that an addition of 3 1/2 per cent of the landed cost was intended to enable the importers to earn a margin of profit and that this would be the minimum price at which the importers would sell. Any dealer would have to pay at the rate of landed cost plus 3 1/2 per cent in getting the supply of copper from the import anything more than the landed cost plus 3 1/2 per cent thereof. As a result of this any actual consumer of the commodity would have to get it direct from the importer and the channel of distribution through the dealer would disappear. The Court held that where the evil sought to be remedied is rise in price and some fixation of price being essential to keep prices within reasonable limits was reasonable restriction.<sup>2</sup>

The mere suggestion that no provision is made for adjustment on account of changes in the cost of production does not amount to infringement of fundamental right to carry on business and to hold and dispose of property. Further, even if there is increase in the cotton prices, the petitioners can absorb it because the controlled price fixed is more fair to the producer. If he sustains alleged losses for some time, it will be a reasonable restriction because the object of the price control is to hold the price line or revert the prices to normal levels and make available cotton yarn to the handloom and powerloom weavers at a fair price which will enable them to withstand competition from mill made cloth. It is not shown that the controlled price is, so grossly inadequate that it not only results in huge losses but also is a threat to the supply position of yarn. The controlled price is in the interest of the country as a whole for just distribution of basic necessities. The controlled price is neither arbitrary nor an unreasonable restriction.<sup>3</sup>

### 23.83. Price Fixation—Zonal basis.

System of fixing the prices according to certain regions or Zones is not new. Once it is recognised that prices could be fixed according to the Zones the cost schedules have necessarily to be different for each Zone. The various items which go into the fixation of prices will differ from Zone to Zone. In *Aiakapalle Coop. Agri and Industrial Society v. Union of India*<sup>4</sup> the Supreme Court did not hold that while classifying Zones on Geographical-cum-agro-economic consideration, any discrimination was made or that the price fixation according to each Zone taking into account all the relevant factors would lead to such discrimination as would attract Art. 14.

1. 1960 SC 430.

2. *Meenakshi Mills v. Union of India*, 1974 SC 366 (384).

3. *Meenakshi Mills v. Union of India*, 1974 SC 366.

4. 1973 SC 734.

The Government may from time to time fix the price or the maximum price at which any commodity may be sold or delivered and different prices may be fixed for different areas or different factories or different types or grades of the commodity. It is enough if the basis adopted is not shown to be patently unreasonable as to be in excess of the power to fix price.

#### 23.84. Minimum Wages.

Section 12 of the Minimum Wages Act 1948 requires every employer to pay to every employee engaged in a scheduled employment wages at a rate not less than the minimum rate of wages fixed under the Act. In *Vijay Cotton Mills Ltd. v State of Ajmer*<sup>1</sup> it was contended that the provisions of the Act were bound to affect harshly and even oppressively a particular class of employers who for purely economic reasons were unable to pay the minimum wages fixed by the authorities but had absolutely no dishonest intention of exploiting their labourers. If it was in the interest of the general public that the labourers should be secured adequate living wages, the intentions of the employer whether good or bad are really irrelevant. Individual employers might find it difficult to carry on the business on the basis of the minimum wages fixed under the Act this must be due entirely to the economic condition of these particular employers. That cannot be a ground for striking down the law itself as unreasonable. The restrictions, though they interfere to some extent with the freedom of trade or business guaranteed under Article 19 (1) (g) of the Constitution, are reasonable and being imposed in the interest of the general public are protected by the terms of Clause (6) of Article 19. A similar plea was raised in *Unichoyji v. State of Kerala*<sup>2</sup>; it was rejected by the Supreme Court.

1. 1955 SC 33.

2. 1962 SCR 346 : 1962 SC 12.

## Directive Principles of State Policy

### SYNOPSIS

- 24.1. Rights against the State.
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#### 24 1. *Rights against the State.*

In the early struggles for liberty, it was nearly always the state or some part of it that was the enemy. Kings, tyrants, dictators these were state officials. The police was the state in action. Government had to be kept under the law, or liberty did not exist. Hence the very strong tradition grew up, a tradition particularly strong among members of the Bar and Bench that it was liberty against government that mattered. Hence the efforts to curb governmental power by Bills of Rights, concepts of natural law, doctrines of the separation of powers and theories of checks and balances. This approach fitted perfectly the individualist philosophy which believed that the least government was the best government.

This concept, however, has had in recent times to be supplemented by another idea, which may be called liberty through government. Certain human

rights, of great value to a great number of people, can be realised through governmental action.

The hungry man must be fed, the sick must be attended to, the old must be provided for, the young must have a chance to enter to the fullest degree into our cultural heritage through education. To deprive people of these essentials to the good life, or to allow the still unresolved problems of our economic system to deprive them without taking step to alleviate the deprivations, is to take away human rights.

Liberty against government and liberty through government pose separate problems. Liberty against government can be secured by restrictions upon state action.

Article 13 (2) expressly says that the State shall not make any law which take away or abridges the rights conferred by Chapter III of our Constitution which enshrines the fundamental rights.

What, then, of those other human rights which must be sought not against but through government? The constitution can tell the legislatures not to do some thing; it can not instruct them also to do something? Such instruction, unlike the prohibition, produces no result until the legislatures act, and they must be free to choose the form of action.

#### 24.2. *Welfare State*

The welfare state is the institutional outcome of the assumption by a society of legal and therefore formal and explicit responsibility for the basic well-being of all of its members. Such a state emerges when a society or its decision-making groups becomes convinced that the welfare of the individual "beyond such provisions as may be made to preserve order and provide for the common defense" is too important to be left to custom or to informal arrangements and private understandings and is therefore a concern of government.<sup>1</sup>

The ideas underlying the welfare state are derived from many different sources. From the French Revolution came notions of liberty, equality and fraternity. From the utilitarian philosophy of Bentham and his disciples came the idea of the greatest happiness of the greatest number. From Bismarck and Beveridge came the concepts of social insurance and social security. From the Fabian Socialists came the principle of the public ownership of basic industries and essential services. From Tawney came a renewed emphasis on equality and rejection of avarice as the mainspring of social activity. From the Webb's came proposals for abolishing the causes of poverty and cleaning up the base of society.<sup>2</sup>

There is, however, no positive or comprehensive philosophy, no ideology that underlies the many policies and programmes that are supposed to form part of the welfare state.

Whatever its origins, the terms "welfare state" came into general use in the year after 1945. No longer is the state merely the policeman who keeps law and order, its business is now positively to promote the welfare of all its citizens. The term "welfare state" reflects an attitude towards the state, which sees it as a positive agent for the promotion of social welfare. In this it can be contrasted with the laissez-faire ideal of the state.<sup>3</sup>

1. International Encyclopedia of Social Sciences, Vol. 16 p. 512.

2. Robson... *Welfare State and Welfare Society*, p. 11

3. *Ibid.*

The believers in *laissez-faire* saw the functions of the Government as being primarily those of protecting the community against external attack, maintaining internal law and order and guaranteeing contracts; thus it provided a framework within which private enterprise and the free market could work. Beyond this, they only recognized a very narrow range of public services as being justified on the grounds that private enterprise could not provide them. These included a minimum provision for the relief of the destitute or the undertaking of public works (such a harbours, canals or lighthouses). In general, they believed that public enterprise was likely to be inefficient and wasteful and that taxation was a necessary evil, draining away money which would be better left to fructify in the pockets of the people.<sup>1</sup> In contrast to this *laissez-faire* attitude, we now accept that social welfare demands a much wider and more persuasive range of Government activity. Not only should the Government provide social services, such as social security, medical treatment, education, welfare facilities and subsidized housing, but these should go beyond the provisions of a bare minimum towards ensuring that all have equal opportunity, so far as the country's resources allow.<sup>2</sup>

A theory of the welfare state should be based on the following propositions; the welfare state is devoted to the well-being of the whole society; it is as much concerned with maintaining or improving conditions for those who enjoy a good life style as with raising the standard of living of those who fall below an acceptable national minimum; it recognises no vested interests as standing in the way of maximising welfare whether those of enterprisers, employees, distributors, consumers, landowners, developers, professionals, investors or financiers. Welfare is of unlimited scope. It extends to social and economic circumstances, conditions of work, remuneration, the character and scope of the social services, the quality of the environment, recreational facilities and the cultivation of the arts among its essential elements are a high degree of personal freedom, including freedom of expression, speech and writing, freedom of movement, a political regime based on the principles of social democracy, and protection of individual citizens against abuse of power by public authorities and other organisation.<sup>3</sup>

A welfare state requires the acceptance of legitimate authority, and obedience to the reign of law.<sup>4</sup> There is a very well written article on 'welfare state.'

The concept of the welfare State involves much more than the social services. It is concerned with the Budget and tax policy, the control of the money and credit supply, with industrial location and the development areas, areas with the Monopolies Commission, the Restrictive Practices Court to mention only the main example. But the social services are nevertheless its most characteristic element, since they are concerned with the positive provision of services to individual, of a type and on a scale that they would not obtain through the free market. The aim of the modern social services goes beyond providing the basic minimum of poor relief, elementary education or protection against epidemic disease, which is essential for civilized urban society. The Welfare State ideal conceives that an increase of social welfare is brought about if people can get a secure minimum income when he cannot earn, medical treatment suited to their needs when they are ill, educational opportunities according to their age, aptitude and ability, a chance of decent housing at rents they can afford, welfare services for the old and the children, and so on. It

1. Sleeman: *The Welfare State*, p. 174.

2. *Ibid.*

3. Robson: *Welfare State and Welfare Society*, p. 174.

4. *Ibid.*

5. *International Encyclopedia of Social Sciences*, Vol. of 15, 16, 17 p. 514-518.

sees these as more likely to be provided adequately by Government action than through the market.

Poverty and dependence are no longer regarded as evidence of personal failure. Quite apart from the physically disabled, workers who are under-paid and unemployed or intermittently employed are considered to be impoverished through no fault of their own. Where the supply of labour nearly always exceeds the demand and opportunity is unevenly distributed, it is held that the free market fails in a vast number of cases to proportion reward to merit. An income large enough to provide the basic necessities of life in adequate measure is regarded as the right of every member of society. If anyone's income falls short, it should be supplemented not as an act of charity but as an act of social justice.

Given glaring inequalities of income, the first concern of the welfare state in its initial phase has been to achieve distributive justice. Government action may accomplish this (1) by expanding the number of public services ; (2) by a progressive tax system and a variety of taxes levied on employers for the benefit of their employees ; (3) by facilitating the growth of a strong labour movement enabling workers to bargain on equal terms with their employers and a consumer movement enabling buyers to bargain more effectively with sellers; and (4) by means of minimum-wage legislation.

One of the earlier devices for effecting a redistribution of income was the use of a progressive tax system.

Legislation encouraging collective bargaining as a factor in influencing the distribution of income consisted initially of removing the legal bans and disabilities imposed on labour unions.

Perhaps the most drastic departure from traditional economic practice has been the adoption of minimum-wage legislation.<sup>1</sup>

Compulsory social insurance has become the classical means for meeting the need of the economically disabled. This device applies the principle that society must set aside, and require its members to set aside during the periods when they are gainfully employed, small sums of money to provide against expected or unexpected future disability. Payments and benefits usually vary, at least up to a point, with the amount of earnings of the insured. In some cases the provision is for the cost of care (as with the victims of illness or industrial accident), in others for the loss of earnings.

The welfare state concerns itself not only with securing an equitable income for those who are employed and with caring for those who are incapable of employment ; it also addresses itself to the problem of those who are able to work but prevented from doing so by forces over which they have no control. In such cases it is customary to distinguish between frictional unemployment and cyclical unemployment. When cyclical unemployment becomes acute it is generally called mass unemployment.

It must be a function of the State to protect its citizens against mass unemployment, as definitely as it is now the function of the State to defend the citizens against attack from abroad and against robbery and violence at home.

### 24.3. Welfare State and Welfare Society.

There is a distinction between a welfare society and a welfare state. The welfare state is what Parliament or the legislature has decreed and the

1. *Encyclopedia of Social Sciences*, Vol. 16, p. 515-16.

government does. The welfare society is what the people do, feel and think about matters which bear on the general welfare.<sup>1</sup>

The principal watch word which is now invoked to justify welfare policies is equality. It has to serve for validating proposals or decisions in the fields of education, health, housing, taxation, sex relations, the position of women in society and much else.

The principle of social equality had never been as fully accepted in these islands as in the United States, partly because the British people never completely shed the deference to titles of nobility which were a heritage of foudalism, and partly because a wide spread snoberry. Better educational opportunities have in recent years resulted in greater social equality.

The resistance to equality of treatment for women has been most marked in the economic field.

It is to be the endeavour of the state to secure a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, to protect the weaker sections of the people from social, injustice, and all forms of exploitation, to raise the standard of living of its people and the improvement of public health.

#### 24.4 Welfare State—Avowed purpose of Constitution

The avowed purpose of our Constitution is to create a Welfare State. The directive principles of State policy set forth in Part IV of our Constitution enjoin upon the State, the duty to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. There is no conflict between the two.

While our fundamental rights are guaranteed by Part III of the Constitution. Part IV of it on the other hand, lays down certain directive principles of State Policy. The provisions contained in that Part are not enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country.<sup>2</sup>

*In re Kerala Education Bill, 1957*,<sup>3</sup> Das, C. J., said : “Although the legislation may have been undertaken by the State of Kerala in discharge of the obligation imposed upon it by the directive principles enshrined in Part IV of the Constitution, it must nevertheless subserve and not override the fundamental rights conferred by the provisions of the Articles contained in Part III of the Constitution as explained by the Supreme Court in the *State of Madras v. Champakam*<sup>4</sup> directive principles of State policy have to conform to and run as subsidiary to the chapter on fundamental rights. Nevertheless, in determining the scope and ambit of fundamental rights the court may not entirely ignore the directive principles of State policy laid down in Part IV but should adopt the principles of harmonious construction and should attempt to give effect to both as much as possible.<sup>5</sup>

1. Robson : *Welfare State and Welfare Society*, Preface, p. 7.

2. *Chandrabhawan Boarding and Lodging v. State of Mysore*, (1970) 2 SCR 600 (612), 1970 SC 2042 (2050).

3. 1958 SC 956 (966).

4. 1951 SCR 525 (531) : 1951 SC 226 (228).

5. *Hanif Qureshi v. State of Bihar*, 1958 SC 781.

In *State of Madras v. Champakam*<sup>1</sup> it was said that 'the directive principles of the state policy which by Article 37 was expressly-made unenforceable by a court can not override the provisions found in Part III which, notwithstanding other provisions are expressly made enforceable by the Supreme Court. The directive principles of State policy even if disobeyed can not affect the legislative power of the State, as they are directory in scope and operation.'<sup>2</sup>

### 24.5 Directive Principles

Part 4 of the Constitution lays down the Directive Principles of State Policy. Here the word 'state', unless the context otherwise directs has the same meaning as in Part III.<sup>3</sup>

The provisions contained in Part 4 shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.<sup>4</sup>

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.<sup>5</sup>

The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.<sup>6</sup>

The State shall, in particular, direct its policy towards securing, (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.<sup>7</sup>

The State shall make provision for securing just and humane conditions of work and for maternity relief.<sup>8</sup>

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or

1. 1951 SC 226.

2. *Deepchand v. State of U. P.*, 1959 SC 649 (664).

3. *Constitution of India*, Art. 36; Meaning of "State".

4. *Ibid.*, Art. 37.

5. *Ibid.*, Art. 38 (1).

6. *Ibid.*, Art. 38 (2) added by the Constitution (44 Amendment) Act, 1978.

7. Clause (f) was substituted by an Constitution (42 Amendment) Act, 1976. Article 24 of the Constitution prohibits the employment of children below the age of fourteen.

8. *Constitution of India*, Art. 42.



otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.<sup>1</sup>

The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of under-takings, establishments or other organisations engaged in any industry.<sup>2</sup>

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want.<sup>3</sup>

The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.<sup>4</sup>

The State shall promote with special care the educational and economic interest of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.<sup>5</sup>

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.<sup>6</sup>

The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.<sup>7</sup>

There is no conflict between the different parts of Article 48 and indeed the two last directives for preserving and improving the breeds and for the prohibition of slaughter of certain specified animals represent, as is indicated by the words "in particular," two special aspects of the preceding general directive for organising agriculture and animal husbandry on modern and scientific lines. Whether the last two directives are ancillary to the first or are separate and independent items of directives, the directive for taking steps for preventing the slaughter of the animals is quite explicit and positive and contemplates a ban on the slaughter of the several categories of animals specified therein, namely, cows and calves and other cattle which answer the description of milch or draught cattle. The protection recommended by this part of the directive is confined only to cows and calves and to those animals which are presently or potentially capable of yielding milk or of doing work as draught cattle but does not, from the very nature of the purpose for which it is obvious-

1. *Constitution of India*, Art. 43.

2. *Ibid.*, Art. 43-A.

3. *Ibid.* Art. 41.

4. *Ibid.*, Art. 45.

5. *Ibid.*, Art. 46.

6. *Ibid.*, Art. 47.

7. *Ibid.*, Art. 48.

ly recommended, extend to cattle which at one time were milch or draught cattle but which have ceased to be such.<sup>1</sup>

Pursuant to these directive principles and in accordance with Entry 15 in List II of Schedule 7, the Legislatures of Bihar, Uttar Pradesh and Madhya Pradesh, enacted the statutes which were challenged as unconstitutional.<sup>2</sup>

So approaching and analysing the problem, the court reached to the conclusion : (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she/buffaloes: male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48 ; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks cattle or buffaloes after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public.<sup>3</sup>

The Supreme Court declared that the Acts in so far as they prohibited the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, were constitutionally valid but, in so far as they totally prohibited the slaughter of she-buffaloes, breeding bulls and working bullocks (cattle and buffalo), without prescribing any test or requirement as to their age or usefulness, they infringed the rights of the petitioners under Art. 19 (1)(g) and was to that extent void.<sup>4</sup>

#### 24. 6. Directive Principle—Article 39-A

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This Article emphasises that free legal service is an inalienable element of 'reasonable fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice.

The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Art. 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.

The Supreme Court directed that on the next remand dates, when the under-trial prisoners, charged with bailable offences, were produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that

1. *Mohd. Hanif Quareshi v. State of Bihar*, 1958 SC 731 (736).

2. *Ibid.*, p. 736.

3. *Ibid.*, p. 755.

4. *Ibid.*, pp. 755-756.

no objection was raised to such lawyer on behalf of such under-trial prisoners.<sup>1</sup>

The State shall take steps to separate the judiciary from executive in the public services of the State.<sup>2</sup>

The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.<sup>3</sup>

The State shall endeavour to secure for the citizen a uniform civil code throughout the territory of India.<sup>4</sup>

It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.<sup>5</sup>

The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.<sup>6</sup>

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.<sup>7</sup>

#### **24.7. *Fundamental Rights and Directive Principle compared.***

Our constitution deals with two types of rights diametrically opposed in relation to the power of the state. The substance of one type of right can be realized only through restraint of state power. These rights are contained in Part 3 of the Constitution, and are given the status of fundamental rights. By contrast the substance of the other type can be realized only through the exercise of state power. These are mentioned in Part 4 of the constitution which bears the title "Directive Principles". The content of these right differs from the content of fundamental human rights or freedoms realized, through restraint of interference by state power. They relate to benefits to the life of the people realized through the exercise of state power.....When it is considered that the state proclaims its basic programme for fully equipped welfare, services and guarantees to the people that appropriate services will be established so that they can enjoy these benefits in their daily lives, then it must be said that the rights referred to in Part 4 of the Constitution does not bestow any benefits other than ones that the people can enjoy in their daily lives by means of various social services such as those relating to public health, education, social welfare, all of which the state provides. <sup>8</sup>

It is not possible to fit fundamental rights and directive principles in two distinct and strictly defined categories, but it may be stated broadly that fundamental rights represent civil and political rights while directive principles

1. *Hussainara Khatoon v. State of Bihar*, 1979 SC 1369 (1374).

2. *Constitution of India*, Art. 50.

3. *Ibid.*, Art. 40.

4. *Ibid.*, Art. 44.

5. *Ibid.*, Art. 49.

6. *Ibid.*, Art. 51.

7. *Ibid.*; Art. 48-A.

8. CCL Cases, p. 284.

embody social and economic rights. Both are clearly part of the broad spectrum of human rights. If we look at the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 18, 1948, we find that it contains not only rights protecting individual freedom (see Articles 1 to 21) but also social and economic rights intended to ensure socio-economic justice to everyone (see Articles 22 to 29). There are also two International Covenants on Civil and Political Rights and the other is the International Covenant on Economic, Social and Cultural Rights. Both are international instruments relating to human rights.<sup>1</sup>

#### 24.8. Primacy as between Part III and Part IV.

*Keshavananda Bharati*<sup>2</sup>, has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there was that the Court must wisely read the collective Directive Principles of Part IV into the individual fundamental rights of Part III neither Part being superior to the other. Since the days of *Dorairajan*,<sup>3</sup> judicial opinion has hesitatingly tilted in favour of Part III but in *Keshavananda Bharati* the supplementary theory, treating both Parts as fundamental, gained supremacy. Khanna, J. spoke with a profound sense of depth: "The Directive Principles embody a commitment which was imposed by the Constitution makers on the State to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness. They incorporate a pledge to the coming generations of what the State would strive to usher in." There should be no reluctance to abridge or regulate the fundamental rights to property if it was felt necessary to do so for changing the economic structure attaining the objective, contained in the Directive Principles. According to Chandrachud, J.: "What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. The freedoms of a few have to be abridged in order to ensure the freedom of all. If State fails to create conditions in which the Fundamental Freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."

The matter has been extensively considered by the Full Bench in this *Keshavananda Bharati*<sup>4</sup> Shelat and Grover, JJ., observed: "While most cherished freedoms and rights have been guaranteed the Government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised then alone the dignity of the individual can be achieved. Our constitution makers did not contemplate any disharmony between the fundamental rights and the directive principles. They were meant to supplement one another. It can well be said that the directive principles prescribed the goal to be attained and fundamental rights laid down the means by which that goal was to be achieved."

Hegde and Mukherjea, JJ., said that "Our founding fathers were satisfied that there was no antithesis between the Fundamental Rights and the Directive Principles. One supplements the other. The Directives lay down the end to be achieved and Part III prescribes the means through which the goal is to be reached."

1. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (702).

2. 1973 SC 1461; *State of Kerala v. N. M. Thomas*, 1976 SC 490 (534).

3. 1951 SCR 525: 1951 SC 226.

4. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225: 1973 SC 1461.

Ray, J., observed : "But the Directive Principles are also fundamental. They can be effective if they are to prevail over fundamental rights of a few in order to subserve the common good and not to allow economic system to result to the common detriment. It is the duty of the State to promote common good. Parts III and IV of the Constitution touch each other and modify. They are not parallel to each other. Different legislation will bring in different social principles. These will not be permissible without social content operating in a flexible manner."

Jaganmohan Reddy, J., observed : "There can be no doubt that object of the Fundamental rights is to ensure the ideal of political democracy and prevent authoritarian rule, while the object of the Directive Principles of State Policy is to establish a welfare State where there is economic and social freedom without which political democracy has no meaning. What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Art 37, are fundamental in the governance of the country."

Palekar, J., observed : "The Preamble read as a whole, does not contain the implication that in any genuine implementation of the Directive Principles, a fundamental right will not suffer any diminution."

Mathew, J., observed : "I can see no incongruity in holding, when Article 37 says in its latter part 'it shall be the duty of the State to apply these principles in making laws' that judicial process is 'State action' and that the judiciary is bound to apply the Directive Principles in making its judgment."

Beg, J., observed : "Perhaps, the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the State and the Directive Principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path."

Chandrachud, J. observed : "Our decision of this vexed question must depend upon the postulate of our Constitution which aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the latter a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience."

In *Minerva Mills*<sup>1</sup> case Bhagwati, J. said that the view taken in *State of Madras v. Champakan*,<sup>2</sup> that the directive principles had to conform to and run as subsidiary to the chapter on fundamental rights was patently wrong.

In a later case *State of Kerala v. N. M. Thomas*,<sup>3</sup> Fazal Ali, J. after analysing the judgment delivered by all the Judges in the *Kesavananda Bharati*'s<sup>4</sup> case on the importance of the Directive Principles observed as follows : "In view of the principles adumbrated by this Court it is clear that the Directive Principle form the fundamental feature and the social conscience of the Constitution enjoins upon the State to implement those directive principles.

1. (1980) 3 SCC 625.

2. 1957 SCR 575 : 1957 SC 226.

3. 1976 SC 490.

4. 1973 SC 1461.

The directives thus provide the policy, the guidelines and the end of socio-economic freedom of Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the constitution".<sup>1</sup>

### 24.9. Object of Directive Principles

The Constitution makers had, among others, one dominant objective in view and that was to ameliorate and improve the lot of the common man and to bring about a socio-economic transformation based on principles of social justice. While the Constitution makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have the dignity of the individual. Part III of the Constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of the individual. Our Constitution makers did not contemplate any disharmony between the fundamental rights and the directive principles. They were meant to supplement one another. It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal was to be achieved. The Constituent Assembly did not accept a proposal made by B. N. Rau that the fundamental rights should be subordinate to the directive principles.<sup>2</sup>

Part IV of the Constitution is designed to bring about the special and economic revolution that remained to be fulfilled after independence. The aim of the Constitution is not to guarantee certain liberties to only a few of the citizens but for all. The Constitution visualizes our society as a whole and contemplates that every member of the society should participate in the freedoms guaranteed. To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution. A society like ours steeped in poverty and ignorance cannot realize the benefit of human rights without satisfying the minimum economic needs of every citizen of this country. Any Government which fails to fulfil the pledge taken under the Constitution cannot be said to have been faithful to the Constitution and to its commitments.<sup>3</sup>

The matter was again examined in *Minerva Mills*<sup>4</sup> case Chandrachud, J, there observed :

"The Indian Constitution was founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution."<sup>5</sup>

1. *State of Kerala v. N. M. Thomas*, 1976 SC 490 : *Pathumma v. State of Kerala*, 1978 SC 771 (776).

2. *Keshavanand Bharti v. State of Kerala*, (1973) 3 SCC 225 (458).

3. *Ibid.*, p. 502-3.

4. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (654).

1. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (654), Chandrachud, C.J.,

**24.10. Non-enforceability of rights in Part IV.**

Simply because the directive principle do not create rights enforceable in a court of law, it does not follow that they do not create any obligations on the State. A rule imposing an obligation of duty would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite of any problem relating to its enforcement.<sup>1</sup>

The crucial test which has to be applied is whether the directive principles impose any obligations or duties on the state; if they do, the State would be bound by a constitutional mandate to carry out such obligations or duties even though no corresponding right is created in anyone which can be enforced in a court of law. Article 37 of the Constitution says that it shall be the duty of the State to apply these principles in making laws. But if for some reasons they do not pass any laws the Court cannot force the Parliament or the State Legislature to do so.<sup>2</sup>

The non-justiciability clause only provides that the infant State shall not be immediately called upon to account for not fulfilling the new obligations laid upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them.<sup>3</sup>

**24.11. Obligations of the State in regard to Fundamental Rights.**

It has sometimes been said that the fundamental rights deal with negative obligations of the State not to encroach on individual freedom, while the directive principles impose positive obligations on the State to take certain kind of action. But, Bhagwati, J. said "I find it difficult to subscribe to this proposition because though the latter part may be true that the directive principles require positive action to be taken by the State, it is not wholly correct to say that the fundamental rights impose only negative obligations on the State. There are a few fundamental rights which have also a positive content and that has been, to some extent unfolded by the recent decisions of this Court in *Hussainara Khatoon v. State of Bihar*,<sup>4</sup> *Madhav Hayawadanrao Hoskot v. State of Maharashtra*,<sup>5</sup> and *Sunil Batra v. Delhi Administration*.<sup>6</sup> There are new dimensions of the fundamental rights which are being opened up by the Supreme Court and the entire jurisprudence of fundamental rights is in a stage of resurgent evolution. Moreover, there are three Articles, namely, Article 15 (2), Article 17 and Article 23 within the category of fundamental rights which are designed to protect the individual against the action of other private citizens and seem to impose positive obligations on the State to ensure this protection to the individual. I would not, therefore, limit the potential of the fundamental rights by subscribing to the theory that they are merely negative obligations requiring the State to abstain as distinct from taking positive action. The only distinguishing feature, to my mind, between fundamental rights and directive principles is that whereas the former are enforceable in a court of law the latter, are not".<sup>7</sup>

1. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (708).

2. *Ibid.* p. 708.

3. *Ibid.*, p. 704.

4. (1979) 3 SCR 169 : 1979 SC 1360.

5. (1979) 1 SCR 192 : 1978 SC 1548.

6. (1979) 1 SCR 392 : 1978 SC 1675.

7. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (704).

### 24.21. Directive Principles—Reasonable restrictions on Fundamental Rights.

The principle accepted by the Supreme Court is that if a purpose is one falling within the directive principles, it would definitely be a public purpose.<sup>1</sup> It may also be pointed out that in a recent decision given by the Supreme Court in *Kasturi Lal Lakshmi Reddy v. State of J. & K.*<sup>2</sup> it was held that every executive action of the government, whether in pursuance of law or otherwise, must be reasonable and informed with public interest and the yardstick for determining both reasonableness and public interest is to be found in the directive principles and therefore, if any executive action is taken by the government for giving effect to a directive principle, it would *prima facie* be reasonable and in public interest.

If a law is enacted for the purpose of giving effect to a directive principle and it imposes a restriction on a fundamental right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a directive principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of mere normal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic justice. The dynamic principle of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a directive principle with a view to promoting social and economic justice, it would be difficult to say that such law violates the principle of egalitarianism and is not in accord with the principle of equality before the law as understood not in its strict and formalistic sense, but in its dynamic and activist magnitude. In the circumstances, the court would not be unjustified in making the presumption that a law enacted really and genuinely for giving effect to a directive principle in furtherance of the cause of social and economic justice, would not infringe any fundamental right under Article 14 or Article 19.<sup>3</sup>

The effect of giving greater weightage to the constitutional mandate in regard to fundamental rights would be to relegate the directive principles to a secondary position and emasculate the constitutional command that the directive principles shall be fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws. It would amount to refusal to give effect to the words "fundamental in the governance of the country" and a constitutional command which has been declared by the Constitution to be fundamental would be rendered non-fundamental. The result would be that a positive mandate of the Constitution commanding the State to make a law would be defeated by a negative constitutional obligation not to encroach upon a fundamental right and the law made by the legislature pursuant to a positive constitutional command would be delegitimised and declared unconstitutional. This plainly would be contrary to the constitutional scheme because the Constitution does not accord a higher place to the constitutional obligation in regard to fundamental rights over the constitutional

1. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (709).

2. *Ibid.* p. 709; *Kasturi Lal v. State of J. & K.* (1980) 4 SCC 1.

3. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (709).



obligation in regard to directive principles and does not say that the implementation of the directive principles shall only be within the permissible limits lies down in the chapter on fundamental rights.<sup>1</sup>

The result is that the whole purpose behind the Constitution, which was meant to be a dynamic Constitution leading to a certain goal step by step is somewhat hampered and hindered by the static element being, emphasised a little more than the dynamic element..... If in the protection of individual liberty you protect also individual or group inequality, then you come into conflict with the directive principle which wants, according to own Constitution, a gradual advance, or let us put it in another way, not so gradual but more rapid advance, whenever possible to a State where there is less and less inequality and more and more equality. If any kind of an appeal to individual liberty and freedom is construed to mean as an appeal to the continuation of the existing inequality, then you get into difficulties. Then you become static, unprogressive and cannot change and you cannot realize the ideal of an egalitarian society which I hope most of us aim at".<sup>2</sup>

"If the exclusion of the fundamental rights embodied in Articles 14 and 19 could be legitimately made for giving effect to the directive principles set out in clauses (b) and (c) of Article 39 without affecting the basic structure, I fail to see", said Bhagwati, J. "why these fundamental rights cannot be excluded for giving effect to the other directive principles. If the constitutional obligation in regard to the directive principles set out in clause (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the fundamental rights under Articles 14 and 19, there is no reason in principle why such precedence cannot be given to the constitutional obligation in regard to the other directive principles which stand on the same footing".<sup>3</sup>

It is now universally recognised that the difference between the Fundamental Rights and Directive Principles lies in this that Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Fundamental Rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to Courts. So they are made justiciable. But, it is also evident that notwithstanding their great importance, the Directive Principles cannot in the very nature of things be enforced in a Court of law. It is unimaginable that any Court can compel a legislature to make a law. If the court can compel Parliament to make laws then Parliamentary democracy would soon be reduced to an oligarchy of Judges. It is in that sense that the Constitution says that the Directive Principles shall not be enforceable by Courts. It does not mean that Directive Principles shall not be enforceable by Courts. It does not mean that Directive Principles are less important than Fundamental Rights or that they are not binding on the various organs of the State. Article 37 of the Constitution emphatically states that Directive Principles are nevertheless Fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the Courts as a Code of interpretation. Fundamental Rights should thus be interpreted in the light of the Directive Principle and the latter should, whenever and wherever possible,

1. *Minerva Mills v. Union of India*, (1980) 3 SCC 625 (711).

2. *Ibid.*, p. 711.

3. *Ibid.*, p. 714

be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the Directive Principles or if it is not in discharge of some of the undoubted obligations of the State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the Directive Principles and other provisions of the Constitution.<sup>1</sup>

It should be remembered that the directive principles cannot be regarded only as idle dreams or pious wishes merely by reason of the fact that they are not enforceable by a Court of law. A rule of law in fact does not cease to be such because there is no regular judicial or quasi-judicial machinery to enforce its commands. An attempt to create a truly social Welfare State carries with the idea that in a country like India concentration of wealth in the country must be done away with and its distribution on an equitable basis effected in order to bridge the gap between the rich and the poor. The very purpose of creating such a State is to benefit the weaker and poorer sections of the community to a much greater extent than the rich persons so that the living standards of the people in general may improve. In fact, in such a State, all welfare schemes in their operation generally tend to benefit the poor people to a much greater extent than others. If an equal protection guarantee were enough to invalidate such schemes, improvement in the economic and social conditions of the country would be impossible.<sup>2</sup>

Incorporation of Directive Principles of State Policy casting the high duty upon the States to strive, to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice—social, economic and political—shall inform all the institutions of the national life is not idle print put command to action. We can never forget, except at our peril, that the Constitution obligates the State to ensure an adequate means of livelihood to its citizens and to see that the health and strength of workers, and women, are not abused, that exploitation moral and material, shall be extradited. In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities attired as trade or business or commerce, can be derecognised as trade or business.<sup>3</sup>

#### 24.13. *Conflict between Part III and Part IV*

For the purpose of the directive principles, the word 'State' has the same meaning as given to it under Article 12 for the purpose of the fundamental rights. This would mean that the same State which is enjoined from taking any action in infringement of the fundamental rights is told in no uncertain terms that it must regard the directive principles as fundamental in the governance of the country and is positively mandated to apply them in making laws. This gives rise to a paradoxical situation and its implications are far-reaching. The State is on the one hand, prohibited by the constitutional injunction in Article 13 from making any law or taking any executive action which would infringe any fundamental right and at the same time it is directed by the constitutional mandate in Article 37 to apply the directive principles in the governance of the country and to make laws for giving effect to the directive principles. Both are constitutional obligations of the State and the question is, as to which must prevail when there is a conflict between

1. *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, 1981 SC 298 (335).
2. *Bhim Singhji v. Union of India*, (1981) 1 SCC 166 (221).
3. *Fateh Chand v. State of Maharashtra*, 1971 SC 1825 (1833) : (1972) 2 SCR 828.

the two? When the State makes a law for giving effect to a directive principle, it is carrying out a constitutional obligation under Article 37 and if it were to be said that the State cannot make such a law because it comes into conflict with a fundamental right, it can only be on the basis that fundamental rights stand on a higher pedestal and have precedence over directive principles. But, it is not correct to say that under our constitutional scheme, fundamental rights are superior to directive principles or that directive principles must yield to fundamental rights.<sup>1</sup>

**39-A. Equal justice and free legal aid :—**The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to secure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Read with Art. 21 the Directive Principles in Art. 39-A has been taken cognizance of by the Supreme Court in *Haskot v. State of Maharashtra*<sup>2</sup>, *State of Haryana v. Darshani Devi*<sup>3</sup> and *Hussainara Khatoon v. Home Secretary, State of Bihar*,<sup>4</sup> to lead to certain guidelines in the administration of justice. One of these is that when the accused is unable to engage a counsel owing to poverty or similar circumstances the trial would be vitiated unless the State offers free legal aid for his defence to engage a lawyer to whose engagement the accused does not object. In recent years it has increasingly been realised that there cannot be any real equality in criminal cases unless the accused gets a fair trial of defending himself against the charge laid and unless he has competent professional assistance. In such a case the court possesses the power to grant free legal aid if the interest of justice so require.<sup>5</sup>

Legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is constitutional imperative mandated not only by Article 39-A but by Arts. 14 and 21 of the Constitution.<sup>6</sup>

No one is entitled to the grant of a writ of mandamus for the enforcement of Article 39-A by ordering the State to give financial assistance to him to engage a counsel of his choice on a scale equivalent to, or commensurate with the fees that are being paid to the counsel appearing for the State.<sup>7</sup> The remedy of the accused lies by way of making an application before the court under sub-section (1) of section 304 of the Criminal Procedure Code, 1973 and not by a petition under Art. 32 of the Constitution.

The key word in clause 39 (b) is 'distribute' and the genius of the Article, cannot but be given full pay as it fulfills the basic purpose of reconstructing the economic order. Each word in the Article has a social mission. It embraces the entire resources of the community. Its task is so to undertake distribution as best to subserve the common good. It reorganises by such distribution the ownership and control.<sup>8</sup>

Resources is a sweeping expression and material resources of the community in the context of re-ordering the national economy embraces all the national wealth not merely natural resources all the private and public resources

1. *Minerva Mills Ltd v. Union of India*, 1980 SC 1489 (1845) : (1980) 3 SCC 675 (708).
2. (1979) 1 S C R 192 : 1978 S C 1548.
3. (1979) SCR 184 : 1979 SC 855.
4. (1979) 3 SCR 532 : 1979 SC 1369.
5. *Ranjan Dwivedi v. Union of India*, 1983 SC 624 (629).
6. *Sheela Barse v. State of Maharashtra*, 1983 SC 378 (380).
7. *Ranjan Dwivedi v. Union of India*, 1983 SC 624 (626).
8. *State of Karnataka v. Ranganath*, 1978 SC 215 (249).

of meeting material needs not merely public possessions. Every thing of value or use in the material world is material resource and the individual being a member of the community his resources are part of those of the community—To exclude ownership.

#### 24.14. *Material Resources.*

Article 39 (b) does not mention either movable or immovable property. Material resources are wide enough to cover not only natural or physical resources but also movables or immovables properties.

In *Sanjeev Coke Manufacturing Co. v. M/s Bharat Cooking Ltd.*,<sup>1</sup> Reddy, J. made the following observation : “The next question for consideration is whether the Cooking Coal Mines (Nationalisation) Act is a law directing the policy of the State towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Coal is of course one of the most important known sources of energy and therefore a vital national resource.

#### 24.15. *Distribution.*

The word ‘distribution’ in Art. 39 (b) must be broadly construed so that a court may give full and comprehensive effect to the statutory intent contained in Art. 39 (b). A narrow construction might defeat or frustrate the very object which the Article seeks to subserve.<sup>2</sup>

In the *Karnataka*<sup>3</sup> case the word distribution clearly fell for interpretation and Iyer, J. observed : “The key word is ‘distribution’ and the the genus of the Article cannot but be given full play as it fulfills the basic purpose of reconstructing the economic order, each word in the Article is a social. . . . It embraces the entire material resources of the community. Its task is to distribute such resources. Its goal is to undertake distribution as best to sub-serve the common good. It reorganises by such distribution the ownership and control.”

In *State of Tamil Nadu v. Abu Kavur Bai*<sup>4</sup> Fazal Ali, J. said “It is obvious that in view of the vast range of transactions contemplated on the word ‘distribution’ it will not be correct to construe the word ‘distribution’ in a purely literal sense so as to mean only a division of a particular kind or to particular persons. The apportionment, allotment, allocation, classification clearly fall within the broad sweep of the word ‘distribution’. So construed the word distribution in Art. 39 (b) will include various facets aspects methods and terminology of a broad based concept of distribution. In other words the word ‘distribution’ does not merely mean that property of one should be taken over and distributed to others like land reforms where the lands from the big landlords are taken away and given to landless labourers or for that matter the various urban and rural and ceiling Acts. That is one of the modes of distribution but not the only mode. By nationalisation the transport as also the units the vehicles would be able to go the farthest corner of the State. This would undoubtedly be a distribution for the common good of the people and would be clearly covered by Art. 39 (b).

1. 1983 SC 326.

2. *State of Tamil Nadu v. Abu Kavur Bai*, 1984 SC 326.

3. *State of Karnataka v. Rangnatha*, 1978 SC 215.

4. 1984 SC 326.

## Enforcement of Fundamental Rights

### SYNOPSIS

- 25.1. Legislative powers not absolute.
- 25.2. Article 13---Limitations to legislative powers.
- 25.3. 'Law' and 'Laws in force'.
- 25.4. Amendment of Constitution---Not law.
- 25.5. Customs and usages.
- 25.6. Personal laws.
- 25.7. Constitution is not retrospective.
- 25.8. Article 13 (1) and temporary statute expiry of.
- 25.9. Pre-Constitution Laws.
- 25.10. To the extent of inconsistency---Law is void.
- 25.11. Lack of legislative competence.
- 25.12. Effects of change in Constitution.
- 25.13. To the extent of.
- 25.14. Severability.
- 25.14. Void---meaning of
- 25.15. Effect of Constitution amendment.

#### **25.1. *Legislative powers not absolute.***

The Constitution, has not accepted the absolute supremacy of the Parliament or of the State Legislature. Thus by Art. 245 (1) the legislative power is definitely made 'subject to the provisions of this Constitution.' Turning to the Constitution, Art. 13 (2) provides as follows:—

**“The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”**

This clearly puts a definite limitation on the wide legislative powers given by Art. 246. It is certainly within the competency of the Court to judge and declare whether there has been any contravention of this limitation. In this respect the Court has supremacy over the legislature.<sup>1</sup>

### 25.2. Article 13—Limitations to legislative powers.

There are two principal limitations to the legislative power of the Parliament and the State legislatures namely—

(i) that the law must be within the legislative competence of Parliament or the State legislature as prescribed by Arts. 245 and 246 ; and

(ii) that such law must be subject to the provisions of the Constitution and must not take away or abridge the rights conferred by Part III.

There can be no question that both these matters are justiciable and it is open to the Courts to decide whether Parliament or the State legislature has transgressed either of the limitations upon its legislative power.<sup>2</sup>

This is a clear and unequivocal mandate of the fundamental law prohibiting the State from making any laws which come into conflict with Part III of the Constitution. The authority thus conferred by Articles 245 and 246 to make laws subjectwise in the different legislatures is qualified by the declaration made in Article 13 (2). The power can only be exercised subject to the prohibition contained in Article 13 (2). On the construction of Article 13 (2) there was no divergence of opinion between the majority and the minority in *'Keshava Madhava Menon v. State of Bombay'*<sup>3</sup> It was only on the construction of Article 13 (1) that the difference arose because it was felt that Article could not retrospectively invalidate laws which when made were constitutional according to the Constitution then in force.

The legislative power of Parliament and the State Legislature as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights contained in Part III of the Constitution.

Unless the context otherwise requires, Article 13 of the Constitution provides :

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.<sup>4</sup>

'Law in force', includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."<sup>5</sup>

1. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (107), Dās, J.

2. *Ibid.* p. 107-108.

3. 1951 SC 128.

4. *Constitution of India*, Art. 13 (1).

5. *Ibid.*, Art. 13 (3) (b).

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.<sup>1</sup>

"Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. There is no material difference, between "an existing law" and "a law force".<sup>2</sup>

### 25. 3. 'Law' and 'laws in force'.

The definition of the term 'law' must be read with the first clause. If the definition of the phrase 'law in force' had not been given, it is quite clear that definition of the word 'law' would have been read with the first clause. The definition of the phrase 'law in enforce' is an inclusive definition and is intended to include laws passed or made by a legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in-operation in particular areas or at all. The second definition, does not in any way restrict the ambit of law in the first clause as extended by the definition of that word. It merely seeks to amplify it by including something which but for the second clause definition would not be included by the first definition.<sup>3</sup>

### 25. 4. Amendment of the Constitution.—not law.

Articles 368 and 13 were amended by section 55 of the Constitution (Forty-second Amendment) Act, 1976.

Clause (1) of the amended Art. 368 provided that notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variations or repeal any provision of the Constitution in accordance with the procedure laid down in Article 368.

Clause (3) provided that nothing in Article 13 shall apply to any amendment made under this Article.

Clauses (4) and (5) which were added to Article 368 were declared ultravires by the Supreme Court. There is a consequential alteration in Article 13 also. Clause (4) was added to Article 13. It reads 'nothing in this Article shall apply to any amendment of the Constitution under Article 368'. Any law amending the Constitution is a law passed by the Parliament in the exercise of its constituent power will not be struck down under Article 13.

### 25.5. Customs and Usages.

Customs and usages having in the territory of India the force of the law have been held to be contemplated by the expression all laws inforce.<sup>4</sup>

In so far as statute law of pre-emption is concerned the Supreme Court in *Bhau Ram's*<sup>5</sup> case, decided that the law of pre-emption based on vicinage was void. The reason given by the court to hold statute law void would apply equally to customs.<sup>6</sup> Such a custom was held to be bad because it offended Art. 19 (1) (f). Now what would be the position after the deletion of Art. 19 (1) (f); the right of property being no longer a fundamental right. It is submitted that if a custom which was declared to be void as it infringed the

1. Constitution of India, Art. 13 (2).

2. Constitution of India, Art. 13 (3) (a).

3. *Sant Ram v. Labh Singh*, 1965 SC 314 (316)

4. *Ibid.*, p. 316.

5. 1962 SC 1476.

6. *Sant Ram v. Labh Singh* 1965 SC 314 (315).

fundamental right to property will continue to be void even though the cause of action arose after the right of property ceased to be a fundamental right.

## 25.6. *Personal laws*

The Bombay High Court held that personal law was excluded from the purview of Art. 13.<sup>1</sup>

There is a clear and unequivocal mandate of the Constitution prohibiting the State from making any laws which came in conflict with Part III of the Constitution.<sup>2</sup>

## 25.7. *Constitution is not retrospective.*

A combined and plain reading of the said provisions makes it abundantly clear that a law which is inconsistent with any of the provisions of Part III is void. A law to be valid must not only be one passed by the legislature in exercise of a power conferred on it, but must also be one that does not infringe the fundamental rights declared by the Constitution.

It will be noticed that all that this clause declares is that all laws in force the existing laws, in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting the Constitution. There is nothing in the language of Art. 13 (1) which may be read as indicating an intention to give it retrospective operation. On the contrary, the language clearly points the other way. The provisions of Part III guarantee what are called fundamental rights. Indeed, the heading of Part III is 'Fundamental Rights.' These rights are given for the first time, by and under our constitution. Before the constitution came into force there was no such thing as fundamental right. What Art. 13 (1) provides is that all existing laws which clash with the exercise of the fundamental rights which are for the first time created by the Constitution shall to that extent be void. As the fundamental rights became operative only on and from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that Art. 13 (1) can have no retrospective effect but is wholly prospective in its operation.

In *Keshavan Madhava Menon v. State of Bombay*<sup>3</sup> the majority of the Supreme Court held that the Constitution had no retrospective effect but was wholly prospective in its operation and as the existing laws, in so far as they were inconsistent with the fundamental rights, were rendered void only to the extent of their inconsistency, they were not void for all purposes but were void only to the extent they came in conflict with the fundamental rights. In other words while on and after the commencement of the Constitution no existing law could by reason of Article 13 (1), be permitted to stand in the way of the exercise of any of the fundamental rights that article could not be read as wiping out the inconsistent law altogether from the statute book and as obliterating its entire operation on past transactions, for to do so would be to give it retrospective effect which it did not possess. Such law, existed for all

1. *State of Bombay v. Narasu Appa Mali*, 1952 B. 84 (88).

2. *Behram Khurshid Pesikala v. State of Bombay*, 1955 SC 123 (145).

3. 1951 SC 128 (130).



past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution.

In *Sri Keshavan Madhava Menon v. State of Bombay*<sup>1</sup> the question was whether a criminal proceeding instituted for a contravention of the provisions of the Indian Press (Emergency Powers) Act which amounted to a completed offence before the date of the Constitution according to the ordinary law of procedure could be continued after the Constitution came into force. It was held that although the acts which before the Constitution constituted an offence under that Act, would not, if done after the date of the Constitution, amount to an offence, nevertheless as the Constitution had no retrospective operation, it did not obliterate the offence completed before date of the Constitution and the offender could therefore be proceeded against after the Constitution came into force. The law existed for the past transactions and for enforcing all rights acquired or liabilities incurred before the date of the Constitution.

Under what procedure the rights and liabilities would be enforced did not come up for consideration in *Keshavan Madhava Menon's* case (*supra*) as the procedure adopted throughout was the same, viz. the procedure prescribed by the Code of Criminal Procedure and the observations of their Lordships in that case related to the substantive rights acquired or liabilities incurred under the Act before the Constitution came into force. In *Lachmandas Kewalram Ahuja v. State of Bombay*,<sup>2</sup> the petitioner was prosecuted under the Bombay Public Safety Measures Act, 1947. The procedure being discriminatory was held to be void under Art. 13 of the Constitution and the question arose whether the continuance of the trial after the date of the Constitution according to the discriminatory procedure resulting in the conviction of petitioner could be supported. Setting aside the conviction, the Supreme Court held that although the substantive rights and liabilities acquired or accrued before the date of the Constitution remained enforceable, no body could claim after that date, that these rights or liabilities must be enforced under that particular procedure although it had, since that date, come into conflict with the fundamental right of equal protection of laws guaranteed by Article 14. 'The Constitution', said Das, J. 'has no retrospective operation to invalidate that part of the proceedings that has already been gone through but the Constitution does not permit the special procedure to stand in the way of the exercise or enjoyment of post constitutional rights and must therefore strike down the discriminatory procedure if it is sought to be adopted after the Constitution came into operation'.<sup>3</sup>

In *Nabhirajiah v. State of Mysore*,<sup>4</sup> an order of allotment was made on 13th September, 1949. The Deputy Commissioner refused to reconsider the allotment and the applicant was ordered to deliver possession. The appeal filed by the petitioner was dismissed on 28th December 1949 and the Government declined to interfere in revision by their order dated 14th March 1950. On 11th April, 1950 the petitioner was again directed to hand over possession and as this order was not obeyed forcible possession was taken of the house with police help and given to the allottee. The petitioner then unsuccessfully moved the High Court under Art. 226. In a petition under Art. 32, it was contended that the orders directing the petitioner to deliver possession were bad because they infringed his fundamental rights secured under Art. 31 (2)

1. 1951 SC 128.

2. 1952 SC 235.

3. 1951 SC 128 : 1953 SC 287.

4. 1952 SC 339 (342).

and Art. 19 (1) (f). Dismissing the petition the Supreme Court said : "The answer to the first contention based on Article 31 (2) or Article 19 (1) (f) of the Constitution is a short one. The Constitution came into force on the 26th January, 1950, after the impugned orders were made and at a time when there was nothing like a chapter of Fundamental Rights. The argument that the requisition in that case was not for any public purpose and the restriction on the respondent to hold property must be in the interests of the general public presupposes that the Constitution governed the case. This assumption, however, was not well-founded. The order of allotment was made before the Constitution came into force and at a time when the Control Order provided, validity, that a house could be taken for the occupation of a private individual. During the period of 10 days specified in sub-clause (2), the landlord could not let the house or occupy it himself and on allotment, he was bound to deliver up possession to the allottee. His rights as landlord were thus at an end so far as possession was concerned. The petitioner, sought to get over this difficulty by pointing out that the dispossession took place on 11.4.1950. This, however, was no answer. The dispossession was a mere consequence which followed under clause (3), sub-clause (6) of the Control Order. The right to possession was lost earlier and the landlord merely held on to the property.

Article 13 of the Constitution has no retrospective effect and if, therefore, any action was taken before the commencement of the Constitution in pursuance of the provisions of any law which was a valid law at the time when such action was taken, such action cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part III of the Constitution.<sup>1</sup> The following observations of Das, J. may be appropriately referred to in this context : "As already explained, Art. 13 (1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for, to say that it is, will be to give the laws retrospective effect. So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights".<sup>2</sup>

In *Pannalal Brijraj v. Union of India*,<sup>3</sup> Bhagwati, J. speaking for the Court said : "It is settled that Article 13 of the Constitution has no retrospective effect and if, therefore, any action was taken before the commencement of the Constitution in pursuance of the provisions of any law which was a valid law at the time when such action was taken, such action cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part III of the Constitution.

In determining the validity or otherwise of a pre-constitutional legislation on the ground of any of its provisions being repugnant to the equal protection

1. *Pannalal Brijraj v. Union of India*, 1957 SC 397 (412) ; *Keshavanand Madhava Menon v. State of Bombay*, 1951 SCR 228 (236) ; 1951 SC 128 (130).

2. *Quasim Razvi v. State of Hyderabad*, 1953 SCR 589 ; 1953 SC 156 ; *Laxmanappa Hanumanthappa Jamkhandi v. Union of India*, (1955) 1 SCR 769 ; 1955 SC 3.

3. 1957 SC 397 (412).

clause, two principles would have to be borne in mind, which were enunciated by the majority of the Supreme Court in the case of *Syed Quasim Razvi v. State of Hyderabad*,<sup>1</sup> where the earlier decision in *Lachman Das Kewalram v. The State of Bombay*,<sup>2</sup> was discussed and explained. Firstly, the Constitution has no retrospective effect and even if the law is in any sense discriminatory, it must be held to be valid for all past transactions and for enforcement of rights and liabilities accrued before the coming into force of the Constitution. Secondly, Art. 13 (1) of the Constitution does not necessarily make the whole statute invalid even after the advent of the Constitution. It invalidates only those provisions which were inconsistent with the fundamental rights guaranteed under Part III of the Constitution. The statute becomes void only to the extent of such inconsistency but otherwise remains valid and operative. As was said in *Quasim Razvi's* case (supra) the fact that : "Trial was continued even after 26.1.1950 under the same Regulation would not necessarily render the subsequent proceedings invalid. All that the accused could claim is that what remained of the trial must not deviate from the normal standard in material respects, so as to amount to a denial of the equal protection of laws within the meaning of Art. 14 of the Constitution. For the purpose of determining whether the accused was deprived of such protection, we have to see first of all whether after eliminating the discriminatory provisions in the Regulation, it was still possible to secure to the accused substantially the benefits of a trial under the ordinary law ; and if so, whether that was actually done in the particular case."

In *Shanti Sarup v. Union of India*,<sup>3</sup> the Supreme Court took the view that : "even assuming that the deprivation took place earlier and at a time when the Constitution had not come into force, the order effecting the deprivation which continued from day to day must be held to have come into conflict with the fundamental rights of the petitioner as soon as the Constitution came into force and became void on and from that date under Article 13 (1) of the Constitution". In a number of subsequent decisions of the Supreme Court this passage was held to be applicable only to the facts in that case.<sup>4</sup> In *Sri Jagadguru Kari Basava Rajendra-swami of Govimutt v. Commissioner of Hindu Religious and Charitable Endowments, Hyderabad*,<sup>5</sup> Gajendragadkar, C. J., observed thus regarding the aforesaid passage : "With respect, we are not prepared to hold that these observations were intended to lay down an unqualified proposition of law that even if a citizen was deprived of his fundamental rights by a valid scheme framed under a valid law at a time when the Constitution was not in force, the mere fact that such a scheme would continue to operate even after the 26th January 1950, would expose it to the risk of having to face a challenge under Article 19. If the broad and unqualified proposition is accepted as true, then it would virtually make the material provisions of the Constitution in respect of fundamental rights retrospective in operation."

In *Guru Datta Sharma v. State of Bihar*,<sup>6</sup> *Shanti Swarup's*<sup>7</sup> case, was distinguished in the following words : "We are unable to construe these observations as affording any assistance to the appellant. We have held that the legislation under which the appellant's rights were extinguished, subject to his claim for compensation, was a valid law. It would therefore follow that

1, 1953 SC 156 ; *Habeeb Mohd. v. State of Hyderabad*, 1953 SC 287 (289).

2, 1952 SC 235.

3, 1955 SC 624.

4, *Rabindra Nath v. Union of India*, 1970 SC 470 (477).

5, (1964) 8 SCR 252 : 1965 SC 502.

6, 1961 SC 1684.

7, 1955 SC 624.

the appellant could have no rights which could serve the Constitution so as to enable him to invoke the protection of Part III thereof."<sup>1</sup>

### 25.8. Article 13 (1) and Temporary statute expiry of.

The effect of Art. 13 (1) is quite different from the effect of the expiry of a temporary Statute or the repeal of a Statute by a subsequent Statute, Art. 13 (1) only has the effect of nullifying or rendering all inconsistent existing laws in-effective or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for to say that it is, will be to give the law retrospective effect. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned, the law exists notwithstanding that it does not exist with respect to the future exercise of fundamental rights. To argue that convictions already recorded and all the transactions which were closed, should be reopened, would be to overlook what had been the accepted law for centuries, namely, that when a law was treated as dead, transactions which were past and closed could not be revived and actions which were commenced, prosecuted and concluded whilst the law was operative could not be reopened.<sup>2</sup>

### 25.9. Pre-Constitution laws.

In *Bhikaji Narain v. State of U. P.*,<sup>3</sup> the impugned Act was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by Art. 19 (1) (g) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under Art. 13 (1) that existing law became void "to the extent of such inconsistency".

As explained in *Keshavan Madhava Menon's case*,<sup>4</sup> the law became void not 'in toto' or for all purposes or for all times or for all persons but only "to the extent of such inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens. It did not become void independently of the existence of the rights guaranteed by Part III. In other words, on and after the existing law, as a result of its becoming inconsistent with the provisions of Art. 19 (1) (g) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right.

Article 13 (1) by reason of its language could not be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution. The law continued in force, even after the commencement of the Constitution with respect to persons who were not citizens and could not claim the fundamental right. In short, Art. 13 (1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19 (1) (g).

1. *Rabindra Nath Bose v. Union of India*, 1970 SC 470 (477).
2. *A. K. Gopalan v. State of Madras*, 1950 SC 27 (107-8).
3. 1955 SC 781 (784-85).
4. 1951 SC 128 : 1951 SCR 228.

read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution.<sup>1</sup>

The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then it is not intelligible what "existing law" could have been sought to be saved from the operation of Art. 19 (1) (g) by the amended clause (6) in so far as it sanctioned the creation of State monopoly, for, ex-hypothesi, all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of clause (6) as it then stood.

The American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still-born as it were. The American authorities, therefore, cannot fully apply to pre-Constitution laws which were perfectly valid before the Constitution. But apart from this distinction between pre-Constitution and post-Constitution laws, it must be held that these American authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Art. 13, rendered void "to the extent of such inconsistency". Such laws were not dead for all purpose. They existed for the purposes of pre-Constitution right and liabilities and they remained operative, even after the Constitution, as against non-citizens.

It was only as against the citizens that they remained in a dormant or moribund condition.

#### 25.10. *To the extent of inconsistency—law is void.*

From the earlier proceedings before the Constituent Assembly, it appears that in the original draft of the Constitution, the words "shall stand abrogated" were used instead of "shall be void," in Art. 13 (1), and one of the questions directly before the Assembly was what would be the effect of the use of those words upon pending proceedings and anything duly done or suffered under the existing law. Ultimately, the Article emerged in the form in which it stands at present, and the words "shall stand abrogated" were replaced by the words "shall be void." If the words "stand abrogated" had been there it would have been possible to argue that those words would have the same effect as repeal and would attract section 6 General Clauses Act, but those words have been abandoned and a very strong expression, indeed the strongest expression which could be used, has been used in their place. The meaning of the word "void" is stated in Black's Law Dictionary (3rd Edn.) to be as follows ; "null and void : ineffectual ; nugatory ; having no legal force or binding effect ; unable in law to support the purpose for which it was intended ; nugatory and ineffectual so that nothing can cure it ; not valid.

#### 25.11. *Lack of legislative competence*

The doctrine of eclipse first came to be considered, in *Behram Khursheed Pesikaka v. State of Bombay*,<sup>2</sup> Venkatarama Aiyar, J. drew a distinction between the invalidity arising out of lack of legislative competence and that arising by reason of a check imposed upon the legislature by the provisions contained in the Chapter on Fundamental Rights. He relied on an

1. *Bhikaji Narain v. State of M. P.*, 1955 SC 778 (785).

2. (1955) 1 SCR 613 : 1955 SC 123.

earlier decision of this Supreme Court in *Keshava Madhava Menon v. State of Bombay*,<sup>1</sup> and was of the view that the word "void" in Art. 13 (1) should be construed as meaning in the language of the American Jurists as "relatively void".

The laws under consideration in *Keshava Madhava Menon's*<sup>2</sup> case, as well as in *Behram Khursheed Pesikaka*,<sup>3</sup> were both pre-Constitution laws, and the effect of Art. 13 (1) had to be considered with respect to their constitutionality. *Behram Khursheed Pesikaka's* case, later referred to larger Bench, in view of the constitutional questions involved and in the majority judgement of the Constitution Bench, Mahajan C. J. pointed out that there was no scope for introducing terms like "relatively void", coined by American Jurists in construing a Constitution which is not drawn up in similar language. The majority also observed that they were not able to endorse the opinion expressed by Venkatarama Aiyar, J. that a declaration of unconstitutionality brought about by lack of legislative power stood on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights, and that it was not correct to say that constitutional provisions in Part III of the Constitution merely operated as a check on the exercise of legislative power. It was also observed that when the law-making power of a State is restricted by a written fundamental law, then any law enacted which is opposed to the fundamental law was in excess of legislative authority and was thus a nullity. Both these declarations of unconstitutionality went to the root of the power itself and there was no real distinction between them, and they represented two aspects of want of legislative power. Finally, it was added that a mere reference to the provisions of Art. 13 (2) and of Arts. 245 and 246 was sufficient to indicate that there was no competency in Parliament or a State legislature to make a law which came into clash with Part III of the Constitution after the coming into force of the Constitution.<sup>4</sup>

## 25.12. Effect of change in Constitution

Then came the decision in *Saghir Ahmad*<sup>5</sup> the law under consideration had been passed after the coming into force of the Constitution, the question to be considered was the effect of the Constitution (First Amendment) Act, which had been passed. It was observed that "amendment of the Constitution which came later cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed", and the observation of Prof. Cooley in his work on *Constitutional Limitations* to the effect that "a statute void for unconstitutionality was dead could not be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted" was accepted as sound, and the Court came to the conclusion that legislation in question which violated the fundamental right of the appellants under Art. 19 (1) (g) of the Constitution and was not shown to be protected by clause (6) of the Article, as it stood at the time of the enactment must be held to be void under Art. 13 (2) of the Constitution. The court further held that the Act then under consideration also violated Art. 31 (2) of the Constitution, and thus was invalid.<sup>6</sup>

1. (1951) SCR 228 : 1951 SC 128. ; *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1027).

2. 1951 SCR 228 : 1951 SC 128.

3. (1955) 1 SCR 613 : 1955 SC 123.

4. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1027).

5. (1955) 1 SCR 707 : 1954 SC 728.

6. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1027).

In *Saghir Ahmad* case<sup>1</sup> the doctrine of eclipse was not applied to the case of a Constitutional law, which was unconstitutional as it was in violation of Art. 19 (1) (g) and was not protected by Art. 19 (6) and also because it was in violation of Art. 31 (2). *Saghir Ahmad's* case (supra) in effect completely demolished the argument raised on behalf of the respondents that a post Constitution law which was void, under Arts. 19 (1) and 31 (2) of the Constitution and was thus void from birth could be revived under the doctrine of eclipse.

In *Bhikaji Narain Dhakras v. State of M. P.*,<sup>2</sup> the court was dealing with a pre-Constitution law and not with a post-Constitution law. In that case an argument was put forward that *Saghir Ahmad's* case,<sup>3</sup> would apply. But it was held that that would not be so, for the reason that *Saghir Ahmad's* case, (supra) was dealing with a post-Constitution law, while that case was concerned with a pre-Constitution law. It was in that connection that Art. 13 (1) came to be considered, and it was observed that the true effect of the Article is to render an Act, inconsistent with a fundamental right, inoperative to the extent of the inconsistency. It was further observed that "it was overshadowed by the fundamental right and remained dormant but was not dead".<sup>4</sup>

With the amendment made in the Constitution, it was pointed out, the provisions of the particular Act were no longer inconsistent therewith and the result was that the impugned Act began to operate once again from the date of such amendment. In that connection, observations made in *Bhikaji Narain v. State of M. P.*,<sup>5</sup> may be considered. "It is true that learned Judges did say that they need not rest their decision on the distinction between pre-Constitution and post-Constitution ; but the later part of these observations where the learned Judges say that such laws were not dead for all purposes shows that they had in mind pre-Constitution laws for otherwise they could not have said that they existed for the purpose of pre-Constitution rights and liabilities and they remained operative even after the Constitution as against non-citizens." The decision in *Bhikaji Narain's* case, (supra) must be confined to pre-Constitution laws to which the doctrine of eclipse would apply. The learned Judges in *Bhikaji Narain's* case, (supra) themselves distinguished the earlier decision in *Saghir Ahmad* case,<sup>7</sup> to which Das, acting C. J., who delivered the judgment in *Bhikaji Narain's* case (supra) was also a party".

In *Sundaramier v State of A. P.*,<sup>8</sup> Venkatarama Aiyar, again said that a law made without legitimate competence and a law violative of constitutional limitations on the legislative power were both unconstitutional and both had the same reckoning in a court of law ; and they were both unenforceable. But it did not follow from this that both laws were of the same quality and character and stood at the same footing for all purposes. A law if it lacked legislative competence was absolutely null and void and a subsequent cession of the legislative topic should not revive the law which was still born and the law would have been re-enacted ; but a law within the legislative competence but violative of constitutional limitation was unenforceable but once the

1. (1955) 1 SCR 707 : 1951 SC 728.

2. (1955) 2 SCR 589 : 1955 SC 781.

3. (1955) 1 SCR 707 : 1954 SC 781 (728).

4. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1027).

5. 1955 SC 728 (785).

6. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1028).

7. (1955) 1 SCR 707 : 1954 SC 728.

8. 1958 SCR 422 : 1958 SC 468 (489).

limitation was removed, the law became effective. In other words a post-Constitutional law was not no-est even if it contravened the fundamental right because non-citizen could enforce it.

In *Deep Chand v. The State of Uttar Pradesh*,<sup>1</sup> the majority after referring to all these cases pointed out the distinction between Arts. 13 (1) and 13 (2). and further held that the limitations imposed by Chapter III on legislative power were on the same level as the competence of the legislature to make laws. The following observations will bring out the position clearly : "Parliament and the Legislatures of States have power to make laws in respect of any of the matters enumerated in the relevant list in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution, including Art. 13, i. e. the power is made subject to the limitations imposed by Part III of the Constitution. The general power to that extent is limited. The Legislature, therefore, has no power to make any law in derogation of the injunction contained in Art. 13. Art 13 (1) deals with laws in force in the territory of India before the commencement of the Constitution and such laws in so far as they are inconsistent with the provisions of Part III shall to the extent of such inconsistency be void. The clause, therefore recognizes the validity of the pre-Constitution laws and only declares that said laws would be void thereafter to the extent of their inconsistency with the Part III, whereas clause (2) of that article imposes a prohibition on the State making laws taking away or abridging the right, conferred by Part III and declares that laws made in contravention of this clause shall to the extent of the contravention be void. There is a clear distinction between the two clauses. Under clause (1) a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III whereas no post-Constitution law can be made contravening the provisions of Part III and therefore the law to that extent though made is a nullity from its inception."

The minority however thought that it was not necessary to decide this question in that case, and therefore did not finally express its views.

In *State of Gujarat v. Sri Ambica Mills*,<sup>2</sup> Mathew, J, speaking for the Constitutional Bench said : "If the meaning of the word 'void' in Art. 13 (1) was the same as its meaning in Article 13(2) it is difficult to understand why a pre-Constitution law which takes away or abridges, the rights under Article 19 should remain operative even after the Constitution came into force as regards non-citizens and a post-Constitution law which takes away or abridges them should not be operative as respect of non-citizens.<sup>3</sup> The fact that pre-Constitution law was valid, when enacted can afford no reason why it should remain operative as respects non-citizens after the Constitution came into force as it became void on account of its consistency with Part III. Therefore, the real reason why it remains operative against non-citizens is that it is void only to the extent of its inconsistency with the rights conferred under Article 19 and that its voidness, is therefore confined to citizens, as exhypothesi, the law became inconsistent with their fundamental rights alone. If that be so, we see no reason why a post-constitution law, which takes away or abridges the rights conferred by Article 19 should not be operative in regard to non-citizens as it is void only to the extent of the contravention of the rights, conferred on citizens, namely those under Article 19."<sup>4</sup>

1. (1959) 2 Supple SCR 8 : 1959 [SC 648 ; *Mahendra Lal v. State of U.P.*, 1963 SC 1019 (1028).

2. 1974 SC 1300 (1309).

3. The example is unfortunate for Article 19 does not give rights to non-citizens.

4. See also *Jagnath v. Authorised Officer*, 1972 SC 425.



25.13. *To the extent of.*

The Constitution makers when they used the words "to the extent of" in both clauses of Article 13 intended that the pre-existing law and in the post-Constitution laws should only be void as far as the inconsistency or the contravention went i.e., if only a part of the law was inconsistent or contravened the constitutional prohibition, that part alone would be void and not the entire law.<sup>1</sup>

In *Mahendra Lal v. State of U P*,<sup>2</sup> Wanchoo, J. speaking for the court said : 'The obvious intention behind the use of the words "to the extent of" was to save such parts of a law as were not inconsistent with or in making which the State did not contravene the prohibition against infringement of fundamental rights and that distinction may conceivably introduce considerations of severability ; it has no reference to the time for which the voidness is to continue. Where the Constitution-makers intended to refer to time they have used specific words for that purpose as, for instance, in Art 251. That Article deals with "inconsistency between laws made by Parliament under Arts. 249 and 250 and laws made by the Legislatures of States", and provides that "the law made by Parliament whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy but so long only as the law made by Parliament continues to the effect, be inoperative". If therefore the Constitution makers intended that the provisions in Art. 13 (1) and (2) would only affect laws so long as inconsistency continued or contravention lasted, they could have provided specifically for it. On a plain construction of the clause, the element of time must be excluded. The words "to the extent of" do not import any idea of time.

Art. 13 (1) clearly recognises the existence of pre-existing laws in force in the territory of India immediately before the commencement of the Constitution and then lays down that in so far as they are inconsistent with the provisions of Part III, they shall be void to the extent of such inconsistency. The pre-Constitution laws which were perfectly valid when they were passed and the existence of which is recognised in the opening words of Art. 13 (1) revive by the removal of the inconsistency in question. This in effect is the doctrine of eclipse, which was applied in *Bhikaji Narain*<sup>3</sup> case. Art. 13 (2) begins with an injunction to the State not to make a law which takes away or abridges the rights conferred by Part III. There is thus a constitutional prohibition to the State against making laws taking away or abridging fundamental rights. The legislative power of Parliament and the Legislatures of States under Art. 245 is subject to the other provisions of the Constitution and therefore subject to Art. 13 (2), which specifically prohibits the State from making any law taking away or abridging the fundamental rights. Therefore, the prohibition contained in Art. 13 (2) makes the State as much incompetent to make a law taking away or abridging the fundamental rights as it would be where law is made against the distribution of powers contained in the Seventh Schedule to the Constitution between Parliament and the Legislature of a State. Further, Art. 13 (2) provides that the law shall be void to the extent of the contravention. Now contravention in the context takes place, only once when the law is made, for the contravention is on the prohibition to make any law which takes away or abridges the fundamental rights. There is no question of the contravention of Art. 13 (2) being a continuing matter. Therefore where there is a question of

1. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1029).

2. 1963 SC 1019 (1029).

3. (1955) 2 SCR 589 : 1955 SC 78.

a post-Constitution law, there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Art. 13 (1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13 (2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse. A plain reading therefore of the words in Art. 13 (1) and 13 (2) bring out a clear distinction between the two. Art. 13 (1) declares such pre-Constitution laws as are inconsistent with fundamental rights void. Art. 13 (2) consists of two parts ; the first part imposes an inhibition on the power of the State to make a law contravening fundamental rights, and the second part, which is merely a consequential one, mentions the effect of the breach. Now what the doctrine of eclipse can revive is the operation of a law which was operative until the Constitution came into force and had since then become inoperative either wholly or partially ; it cannot confer power on the State to enact a law in breach of Art. 13 (2) which would be the effect of the application of the doctrine of eclipse to post-Constitution laws. Therefore, in the case of Art. 13 (1) which applies to existing law, the doctrine of eclipse is applicable as laid down in *Bhikaji Narain's case*,<sup>1</sup> but in the case of a law made after the Constitution came into force, it is Art. 13 (2) which applies.

They only import the idea that the law may be void either wholly or in part and that only such portions will be void as are inconsistent with Part III or have contravened Part III and no more.

#### 25.14. Void—meaning of

The meaning of the word “void” in Art. 13 (1) was considered in *Keshava Madhav Menon's case*<sup>2</sup> and again in *Behram Khurshid Pesikaka's case*.<sup>3</sup> In the later case, Mahajan, C. J. pointed out, that the majority in *Keshava Madhav Menon's case*<sup>4</sup> clearly held that the word “void” in Art. 13 (1) did not mean that the statute stood repealed and therefore obliterated from the statute books ; nor did it mean that the said statute was void abinitio. This, follows clearly from the language of Art. 13 (1), which presupposes that the existing laws are good except to the extent of the inconsistency with the fundamental rights. Besides there could not be any question of an existing law being void abinitio on account of the inconsistency with Art. 13(1), as they were passed by competent legislatures at the time when they were enacted. Therefore, the effect of Art. 13 (1) with respect to existing laws in so far as they were unconstitutional was only that it nullified them, and made them “ineffectual and nugatory and devoid of any legal force or binding effect”. The meaning of the word “void” for all practical purposes is the same in Art. 13 (1) as in Art. 13 (2) namely, that the laws which were void were ineffectual and nugatory and devoid of any legal force or binding effect. But the pre-Constitutional laws could not become void from their inception on account of the application of Art. 13 (1). The meaning of the word “void” in Art. 13 (2) is also the same viz., that the laws are ineffectual and nugatory and devoid of any legal force or binding effect, if they contravene Art. 13 (2). But there is one vital difference between pre Constitution and post-Constitution laws in this matter. The voidness of the pre-Constitution laws is not from inception. Such voidness supervened when the Constitution came into force ; and so they existed and

1. 1955 SC 781 : (1955) 2 SCR 589.

2. 1951 SCR 228 ; 1951 SC 128.

3. (1955) 1 SCR 613 ; 1955 SC 123.

4. (1951) SCR 228 : 1951 SC 128.

operated for sometime and for certain purposes ; the voidness of post-Constitution laws is from their very inception and they cannot therefore, continue to exist for any purpose. This distinction between the voidness in one case and the voidness in the other arises from the circumstance that one is a pre-Constitution law and the other is a post-Constitution law; but the meaning of the word "void" is the same in either case, namely, that the law is ineffectual and nugatory and devoid of any legal force or binding effect.<sup>1</sup>

Now what is the effect of an amendment of the Constitution in the two types of cases. So far as pre-Constitution laws are concerned, the amendment of the Constitution which removes the inconsistency will result in the revival of such law by virtue of the doctrine of eclipse, as laid down in *Bhikaji Narain's*<sup>2</sup> case, for the pre-existing laws were not still-born and would still exist though eclipsed on account of the inconsistency to govern pre-existing matters. But in the case of post-Constitution laws, they would be still-born to the extent of the contravention. And it is this distinction which results in the impossibility of applying the doctrine of eclipse to post-Constitution laws, for nothing can be revived which never had any valid existence. The meaning of the word "void" is the same both in Art. 13 (1) and 13 (2), and the application of the doctrine of eclipse in one case and not in the other case does not depend upon giving a different meaning to the word "void" in the two parts of Art. 13 ; it arises from the inherent difference between Art 13 (1) and Art. 13 (2) arising from the fact that one is dealing with pre-Constitution laws and the other is dealing with post-Constitution laws, with the result that in one case the laws being not still-born the doctrine of eclipse will apply while in the other the laws being still-born there will be no scope for the application of the doctrine of eclipse. Though the two clauses form part of the same Article, there is a vital difference in the language employed in them as also in their content and scope. By the first clause the Constitution recognises the existence of certain operating laws and they are declared void, to the extent of their inconsistency with fundamental rights. Had there been no such declaration, these laws would have continued to operate. Therefore, in the case of pre-Constitution laws what an amendment to the Constitution does is to remove the shadow cast on it by this declaration. The law thus revives. However, in the case of the second clause, applicable to post-Constitution law, the Constitution does not recognise their existence, having been made in defiance of a prohibition to make them. Such defiance makes the law enacted void. In their case therefore, there be no revival by an amendment of the Constitution, though the bar to make the law is removed, so far as the period after the amendment is concerned. In the case of post-Constitution laws, it would be hardly appropriate to distinguish between laws which are wholly void—as for instance, those which contravene Art. 31 and those which are substantially void but partly valid—as for instance, laws contravening Art. 19. Theoretically, the laws falling under the latter category may be valid qua non-citizens ; but that is a wholly unrealistic consideration that such nationally partial valid existence of the said laws on the strength of hypothetical and pedantic considerations cannot justify the application of the doctrine of eclipse to them. All post-Constitution laws which contravene the mandatory injunction contained in the first part of Art. 13 (2) are void, as void as are the laws passed without legislative competence, and the doctrine of eclipse does not apply to them. We are therefore of opinion that the Constitution (Fourth Amendment) Act cannot be applied to the U.P. Land Tenures (Regulation of Transfers) Act, 1952 in this case by virtue of the

1. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1030).

2. (1955) 2 SCR 589 : 1955 SC 781.

doctrine of eclipse. It follows therefore that the U. P. Land Tenures (Regulation of Transfers) Act, 1152 is unconstitutional because it did not comply with Art. 13 (2), as it stood at the time it was passed. It will therefore have to be struck down, and the petitioner given a declaration in his favour accordingly.<sup>1</sup>

### 25.15. Severability.

The question whether a statute which is void in part is to be treated as void *in toto*, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to law enacted by bodies which did not possess unlimited powers of legislation. The limitation on their powers may be of two kinds : It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Sections 91 and 92 of the Canadian Constitution, and Section 51 of the Australian Constitution ; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter ; but does it on that account become necessarily void in its entirety ? The answer to this question must depend on whether what is valid could be separate from what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act.<sup>2</sup>

In *re Hindu Women's Rights to Property Act*,<sup>3</sup> the question arose with reference to Hindu Women's Rights to Property Act (18 of 1937). That was an Act passed by the Central Legislature, and had conferred on Hindu widows certain rights over properties which devolved by intestate succession and survivorship. While the subject of devolution was within the competence of the Centre under Entry 7 List III that was limited to property other than agricultural land, which was a subject within the exclusive competence of the Provinces under Entry 21 in List II. Act No. 18 of 1937 dealt generally with property and the contention raised was that being admittedly and *ultra vires* as regards agricultural lands, it was void in its entirety. It was held by the Federal Court that the Central Legislature must, on the principle laid down in *MacLeod v. Attorney General for New Wales*,<sup>4</sup> be presumed to have known its own limitations and must be held to have intended to enact only laws within its competence, that accordingly the word 'property' in Act No. 18 of 1937 must be construed as property other than agricultural land and in that view, the legislation was wholly *intra vires*.

This decision did not proceed on the basis that the Act was in part *ultra vires* and that the remainder however could be separated there from but on the footing that the Act was in its entirety, *intra vires*.<sup>5</sup> It is true that no question of severability was decided but the principle of severability had the approval of that Court clearly appears from the following observations of Gwyer, C. J. "It should not however be thought that the Court has overlooked cases cited to it

1. *Mahendra Lal v. State of U. P.*, 1963 SC 1019 (1030-31).

2. *R. M. D. Chamarbaugwalla v. Union of India*, 1957 SC 628 (633).

3. 1941 FC 72 : 1941 SCR 12.

4. 1891 AC 455.

5. *R. M. D. Chamarbaugwalla v. Union of India*, 1957 SC 628 (633).

in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad. If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended that general words which it had used to be construed only in the narrower sense. If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words. "An Act which is complete, intelligible and valid and which can be executed by itself."<sup>1</sup>

'There is nothing', said Venkarama Ayyar, J. 'in these observations to support the view that the doctrine of severability applies only when the legislation is in excess of the competence of the legislature *quoad* its subject matter, and not when it infringes some constitutional prohibition.'<sup>2</sup>

This doctrine in its relation to fundamental rights was considered by the Supreme Court in three decisions. In *Romesh Thapper* case<sup>3</sup> such an argument was repelled by the Supreme Court. Patanjali Sastri, J., stated the legal position thus "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void "

In *Chintaman Rao v. State of Madhya Pradesh*,<sup>4</sup> the same principle was again restated, by Mahajan, J.

In *Romesh Thapper v. State of Madras*<sup>5</sup> the question was as to the validity of section 9 (1-A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Art. 19 (2) which saved "existing law in so far as it related to any matter which undermined the security of or tended to overthrow the State". It was held by the Supreme Court that as the purpose mentioned in section 9 (1-A) of the Madras Act were wider in amplitude than those specified in Art. 19 (2), and as it was not possible to split up section 9 (1-A) into what was within and what was without the protection of Art. 19 (2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. This case is not an authority for the proposition that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. This decision in *Romesh*

1. Wynes : *Legislature and Executive Power in Australia*, p. 51 citing *Presser v. Illinois*, 1886-116 US 252.

2. *R. M. D. Chamarbaughwala v. Union of India*, 1957 SC 628 (634).

3. *Romesh Thapper v. State of Madras*, 1950 SCR 594 : 1950 SC 124.

4. 1950 SCR 759 : 1951 SC 118.

5. 1950 SCR 594 : 1950 SC 124.

*Thapper v. State of Madras*<sup>1</sup> was referred to in *State of Bombay v. F. N. Balsara*<sup>2</sup> and *State of Bombay v. United Motors (Ltd)*<sup>3</sup> and was distinguished.

In *Chintamanrao v. State of M. P.*<sup>4</sup> the question related to the constitutionality of section 4 (2) of the Central Provinces and Berar Regulation of Manufacturers. of Bidis (Agricultural Purposes) Act No. LXIV of 1948, which provided that no person residing in a village specified in such order shall during the agricultural season engage himself in the manufacture of bidis, and no manufacturer shall during the said season employ any person for the manufacture of bidis. The Supreme Court held that the restrictions imposed by Section 4 (2) were in excess of what was requisite for achieving the purpose of the Act, which was 'to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas' that that purpose could have been achieved by limiting the restrictions to agricultural labour and to define hours, and that, as it stood, the impugned provision could not be upheld as a reasonable restriction within Art. 19 (1) (g). Dealing next with the question of severability, the Court observed that : "The law even to the extent that it could be said to authorise the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right."

The impugned provision, section 4 (2), was by its very nature inseverable, and it could not be enforced without rewriting it. The observation aforesaid must be read in the context of the particular provision which was under consideration. This really was nothing more than a decision on the severability of the particular provision which was impugned therein and it was open to the same comment as the decision in *Ramesh Thappar v. State of Madras*.<sup>5</sup> That was also one of the decision distinguished in *State of Bombay v. F. N. Balsara*.<sup>6</sup>

In *State of Bombay v. F. N. Balsara*,<sup>7</sup> the question was as to the validity of the Bombay Prohibition Act. Sections 12 and 13 of the Act imposed restrictions on the possession, consumption and sale of liquor, which had been defined in section 2 (24) of the Act as including "(a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol, and (b) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purpose of this Act." Certain medicinal and toilet preparations had been declared liquor by notification issued by the Government under section 2 (24) (b). The Act was attacked in its entirety as violative of the rights protected by Art. 19 (1) (f) ; but the Supreme Court held that the impugned provisions were unreasonable and therefore void, in so far as medicinal and toilet preparations were concerned but valid as to the rest. Then, the contention was raised that "as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it was not possible to uphold it even so far as it might be applied within the

1. 1950 SC 124 : 1950 SCR 594.

2. 1951 SC 318 : 1957 SCR 682.

3. 1953 SC 253 : 1953 SCR 1069.

4. 1951 SC 118 (120) : 1950 SCR 759.

5. 1950 SC 124 : 1950 SCR 594.

6. 1951 SC 318 : 1951 SCR 682.

7. 1951 SC 318 (328) : 1951 SCR 682.

constitutional limits, as it was not severable." In rejecting this contention, the Court observed: "These items being thus treated separately by the legislature itself and being severable, and it not being contended, in view of the directive principles of State policy regarding prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties were unreasonable, the impugned sections must be held valid so far as these categories are concerned."

This decision is clear authority that the principle of severability is applicable even when the partial invalidity of the Act arises by reason of its contravention of constitutional limitations. It was argued for the petitioners that in that case the legislature had through the rules framed under the statute classified medicinal and toilet preparations as a separate category, and had thus evinced an intention to treat them as severable, that no similar classification had been made in the Prize Competition Act, (42 of 1955) and that therefore the decision in question did not help the respondent. Put this is to take too narrow a view of the decision. The doctrine of severability rests, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that the intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it. It is a feature usual in latter day legislation in America to enact a clause that the invalidity of any part of the law shall not render the rest of it void, and it has been held that such a clause furnishes only *prima facie* evidence of severability, which must in the last resort be decided on an examination of the provisions of the statute.<sup>1</sup> In discussing the effect of a severability clause, Brandies, J. observed in *Dorcy v. State of Kansas*,<sup>2</sup> that it "provides a rule of construction, which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command". The weight to be attached to a classification of subjects made in the statute itself could not, be greater than that of a severability clause. If the decision in *State of Bombay v. F. N. Balsara*,<sup>3</sup> is examined in the light of the above discussion, it would be seen that while there was a reference in the judgment to the fact that medicinal and toilet preparations were treated separately by the legislature, that was followed by an independent finding that they were severable. In other words, the decision as to severability was reached on the separability in fact of the subjects dealt with by the legislation and the classification made in the rules merely furnished support to it.

The wide reach of this principle appears to have been circumscribed to some extent in a later decision of the Supreme Court in *R. M. D. Chamarbaugwalla v. Union of India*.<sup>4</sup> In that case the constitutionality of Sections 4 and 5 of the Prize Competitions Act (42 of 1955) was challenged on the ground that 'prize competition' as defined in Section 2 (b) of the Act included not merely competitions that were of a gambling nature but also those in which success depended to a substantial degree on skill. The Court, having regard to the history of the legislation, the declared object thereof and the wording of the statute, came to the conclusion that the competitions which were sought to be controlled and regulated by the Act were only those competitions in which

1. *R. M. D. Chamarbaugwalla v. Union of India*, 1957 SC 628 (634).

2. (1924) 264 U.S. 286 : 68 Law Ed. 686 (690).

3. 1951 SCR 682 : 1951 SC 318.

4. 1957 SCR 830 : 1957 SC 628 (636).

success did not depend on any substantial degree of skill That conclusion was sufficient to reject the contention raised in that case ; but, even on the assumption that 'prize competition' as defined in Section 2 (d) of the Act included those in which success depended to a substantial degree on skill as well as those in which it did not so depend.

That being the position in law, it was necessary to consider whether the impugned provisions were severable in their application to competitions of a gambling character, assuming of course that the definition of 'prize competition' in Section 2 (d) was wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American Courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows :<sup>1</sup>

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.<sup>2</sup>

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding the rest has become unenforceable.<sup>3</sup>

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.<sup>4</sup>

4. Likewise, when the valid or invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from it was when it emerged out of the legislature, then also it will be rejected in this entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different section,<sup>5</sup> it is not the form but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.<sup>6</sup>

1. *R. M. D. Chamarbhaugwalu v. Union of India*, 1957 SC 628 (636).

2. *Corpus Juris Secundum*, Vol. 82, p. 156 : Sutherland : *On Statutory Construction*, Vol. 2 pp. 176-177.

3. Cooley's *Constitutional Limitations*, Vol. 1 pp. 360-361 ; Crawford : *On 'Statutory Construction*, pp. 217-18.

4. Crawford on *Statutory Construction*, pp. 218-219.

5. Cooley's : *Constitutional Limitations*, Vol. 1, pp. 361-362.

6. Sutherland on *Statutory Construction*, Vol. 2 p. 194.



7, "In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it."<sup>1</sup>

### 25.15 *Effect of amendment of Constitution*

After the amendment of clause (6) of the Article 19 on 18.6.1951, the impugned Act ceased to be unconstitutional and became revived and enforceable against citizens as against non-citizens. It is true that as the amended clause (6) was not made retrospective the impugned Act could have no operation as against citizens between 26.1.1950 and 18.6.1951 and no rights and obligations could be founded on the provisions of the impugned Act during the said period whereas the amended clause (2) by reason of its being expressly made retrospective had effect even during that period.

But after the amendment of clause (6) the impugned Act immediately became fully operative even as against the citizens. The notification declaring the intention of the State to take over the bus routes to the exclusion of all other motor transport operators was published on 4.2.1955 when it was perfectly constitutional for the State to do so. The Court observed that the contentions put forward by the respondents as to the effect of the Constitution (First Amendment) Act, 1951 are well-founded and the objections urged against them by the petitioners are untenable and must be negatived.

## Exceptions to fundamental rights--validating laws

### SYNOPSIS

- 26.1. Object of.
- 26.2. Constitutional validity.
- 26.3. Acquisition--Meaning of.
- 26.4. Jagirs.
- 25.5. Inams.
- 26.6. Estate--Meaning of
- 26.7. Personal Cultivation.
- 26.8. Ceiling--Second Proviso.
- 26.9. Rights.

#### 26.1. *Object of.*

The acquisition of Zamindari rights and the abolition of permanent settlement was first step in the matter of agrarian reforms. When the first Zamindari abolition laws were passed in pursuance of the programme of social welfare legislation, their validity was impugned on the ground that they contravened the provisions of Arts. 14, 19 and 31 of the Constitution.

The High Court of Patna held that the Act passed in Bihar<sup>1</sup> was unconstitutional while the High Court at Allahabad<sup>2</sup> and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. While the appeals from those proceedings, were pending in the Supreme Court, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution brought forward a Bill to amend the Constitution. The main object was to insert provisions fully securing the Constitutional validity of Zamindari Abolition Laws, in general and certain specified Acts in particular.<sup>3</sup>

"Notwithstanding anything in the foregoing provisions of Part III, no law providing for the acquisition by the State of any estate or any rights therein or for the extinguishment or modification of any such rights shall be

1. *Kameshwar v. State of Bihar*, 1951 Pat. 91.

2. *Surya Pal v. U. P. Government*, 1951 A. 674.

3. Statement of objects and reasons, 1951 *Gaz. of India*, 1951 Part of Sec. 2 p. 357.

deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part."

The Constitution was amended by the Constitution (First Amendment) Act, 1951.

The validity of the Amendment was upheld by the Supreme Court in *Shankari Prasad v. Union of India*.<sup>1</sup> In *Waman Rao v. Union of India*,<sup>2</sup> the Supreme Court again held that no law passed truly for implementing the objective of Art. 31-A (1) (a) could be open to challenge on the ground that it infringed Articles 14, 19 or 31. It was held that the Amendment introduced by Section 4 of the Constitution (First Amendment) Act, 1951 did not damage or destroy the basic structure of the Constitution.

"It may be recalled that the zamindari abolition laws which came first in the programme of social welfare legislation were attacked by the interests affected mainly with reference to Articles 14, 19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, Articles 31-A and 31-B and the Ninth Schedule were enacted by the Constitution (First Amendment) Act, 1951. Subsequent judicial decisions interpreting Article 14, 19 and 31 raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation on the desired lines.

While the abolition of zamindari and the numerous intermediaries between the State and the tiller of the soil had been achieved for the most part, the next objectives in land reform was fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of land owners and tenants in agricultural holdings. In the interest of national economy it felt that the State should have full control over the mineral and oil resources of the country, including in particular, the power to cancel or modify the terms and conditions of prospecting licensees, mining leases and similar agreements. It also became necessary to take over under State management for a temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property. Laws providing for such temporary transference to State management should be permissible under the Constitution. There was a pressing demand for reforms in company law. Such as progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest, the transfer of an undertaking from one company to another, etc., required to be placed above challenge.

To give effect to these reforms the Constitution was again amended by the Constitution (Fourth Amendment) Act, 1955.

"Article 31-A of the Constitution had provided that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it was inconsistent with, or took away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. The protection of this Article was available only in respect of such tenures as were "estates on the

1. 1952 SCR 89 : 1951 SC 458 ; *Sajjan Singh v. State of Rajasthan*, 1965 SC 845.

2. 1981 SC 271 (285)

26th January, 1950, when the Constitution came into force. The expression "estate" had been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganisation of States, the expression had come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments related to lands which were not included in an "estate". Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of Articles 14, 19 and 31 of the Constitution that the protection of Article 31-A was not available to them. It therefore, became necessary to amend the definition of "estate" in Article 31-A of the Constitution by including therein lands held under ryotwari settlement and also lands in respect of which provisions were normally made in land reform enactments "

The Constitution was therefore again amended by Constitution (Seventeenth Amendment) Act, 1964. Art. 31A as amended now reads as follows :

(1) Notwithstanding anything contained in Article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification or any rights of managing agents, secretaries and treasures, managing directors, directors and managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19. or Article 31.

Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent :

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building structure provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) In this article,—

(a) the expression "estate" shall, in relation to any local area, have the

same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any Jagir, Inam of muafi or other similar grant in the States of Tamil Nadu and Kerala, any janmam right ;

(ii) any land held under ryotwari settlement ;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans ;

(b) the expression “rights”, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under raiyat or other intermediary and any rights or privileges in respect of land revenue”.

The Supreme Court upheld the legislative competence of States to deal with land reforms under Entry 18 of List II and Entry 42 of List III in various cases.

This power cannot be denied on the ground that it has some effect on an industry controlled under Entry 52, List I. Effect is not the same thing as subject-matter. If a State Act, otherwise valid, has effect on a matter in List I it does not cease to be a legislation with respect to an entry in List II or List III.

In *Waman Rao v. Union of India*<sup>1</sup> the constitutional amendments by which Art. 31-A (1) (a) was introduced was challenged on the ground that it damaged the basic structure of the Constitution by destroying one of its basic features namely that no law could be made by the legislature so as to abrogate the guarantees afforded by Arts. 14, 19 and 31. It was not denied that under the impugned law the rights available to person affected by that law under any of the Articles in Part III was total or substantially withdrawn. But Chandrachud, J. said ‘Every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is *quintessential* to the basic structure of the Constitution’.

Upholding the validity of the amendment it was said : ‘Article 31-A could easily have appeared in the original Constitution itself as an illustration of its basic philosophy. The First Amendment has thus made the Constitutional idea of equal justice a burning truth. It is like a mirror that reflects the ideals of the Constitution, it is not the destroyer of its basic structure. The provisions introduced by it and the Fourth Amendment for the extinguishment or modification of rights in land held or let for purposes of agriculture or for the purposes ancillary thereto, strengthen rather than weaken the basic structure of the Constitution.’<sup>2</sup> The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities can not damage or destroy, the basic structure of the Constitution. It is impossible for any government, however, expertly advised, socially oriented and

1. 1981SC 271 ; *Waman Rao v. Union of India*, 1981 SC 271 (285).

2. *Ibid.*, p. 285.

prudently managed, to remove every economic disparity, without causing some hardship or injustice to a class of persons who are also entitled to equal treatment under the law.

## 26.2. Constitutional validity

The constitutional validity of Article 31-A was recognised in four decisions of the Supreme Court. Some times, directly sometimes indirectly and some times incidentally. In *Shankari Prasad v. Union of India*<sup>1</sup> the validity of the First Amendment which introduced Article 31-A and 31-B was assailed on six grounds, the fifth ground being that Article 13 (2) took into not only ordinary laws but constitutional amendments also. This argument was rejected and the First Amendment was upheld. In *Sajjan Singh v. State of Rajasthan*<sup>2</sup> the court refused to reconsider the decision in *Shankari Prasad* (supra). In *Golaknath's*<sup>3</sup> case it was held by a majority that the power to amend the Constitution was not located in Article 368. The inevitable result of this holding should have been the striking down of all constitutional amendments, since according to the view of the majority Parliament had no power to amend the Constitution under Article 368. But the Court resorted to the doctrine of prospective over ruling and held that the constitutional amendments, which are already made would be left undisturbed. As a result the First amendment remained inviolate. *Golaknath's* case was over ruled in *Keshavanand Bharati's* case<sup>4</sup> and it was unanimously held that the power to amend the constitution was to be found in Article 368 of the Constitution. The validity of the First Amendment was not questioned.

In these circumstances the Supreme Court said that 'although the Article 31-A has thus construed to be recognized valid, ever since it was introduced in the Constitution we find it somewhat difficult to apply to the doctrine of *stare decisis* for upholding that Article'.<sup>5</sup>

## 26.3. Acquisition—meaning of.

Article 31-A deals with a special subject, namely, the saving of laws providing for acquisition of 'estate'. This article saves any law from an attack under Articles 14, 19 and 31 provided it is for the acquisition by the State of an estate or of any rights therein or the extinguishment or modification of any such rights. It will be noticed that here the article does not refer to property as such, but speaks of an "estate", as defined in the Article and also of rights in the estate. Estate is defined to include, among other things, "any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land agricultural labourers and village artisans". Applying the definition, the lands under cultivation must be regarded as 'estate'. Now the intention underlying Article 31-A is to give protection to State action against Articles 14, 19 and 31 so long as the acquisition is by the State of any estate or of any rights therein or the extinguishment or modification of any such rights.<sup>6</sup> To this protection there is only one exception and that is to be found in the second proviso. It is that land under the personal cultivation of any estate holder of any kind which is within the ceiling limit applicable to such person, shall not be acquired, unless

1. 1951 SC 458.

2. (1965) 1 SCR 33 : 1965 SC 845.

3. (1967) 2 SCR 762 : 1967 SC 1643.

4. 1973 SC 1461.

5. *Waman Rao v. Union of India*, 1981 SC 271 (286).

6. *Ajit Singh v. State of Punjab*, 1967 SC 856

at least market value of the land is given as compensation. Such land can be acquired but only on compensation which is not less than the market value. The word "acquisition" used in the proviso must take its colour from the same word used earlier and not from the word as used in the earlier article in juxtaposition with the word requisition. The word must denote not only the acquisition of ownership, that is to say, the entire bundle of rights but also acquisition of some rights particularly in acquisition which leaves the person an owner in name only.<sup>1</sup>

It may be noticed that Article 31-A (1) (a) mentions four categories ; first acquisition by the State of estate second, acquisition by the State of rights in an estate ; third, the extinguishment of rights in an estate, and, fourthly, the modification of rights in an estate. These four categories are mentioned separately and are different. In the first two categories the State "acquires" either an estate or rights in an estate. In other words there is a transference of an estate or the rights in an estate to the State. When there is a transference of an estate to State, it could be said that all the rights of the holder of the estate have been extinguished. But if the result in the case of the extinguishment is the transference of all the rights in an estate to the State, it would properly fall within the expression "acquisition by the State of an estate." Similarly, in the case of an acquisition by the State of a right in an estate it could also be said that the rights of the owner have been modified since one of the rights of the owner has been acquired.<sup>2</sup>

There is this essential difference between "acquisition by the State" on the one hand and "modification or extinguishment of rights" on the other that in the first case the beneficiary is the State while in the later case the beneficiary of the modification of the extinguishment is not the State. For example, suppose the State is the landlord of an estate and there is a lease of that property, and law provides for the extinguishment of lease held in estate. In one sense it would be an extinguishment of the rights of a lessee, but it would properly fall under the category of acquisition by the State because the beneficiary of the extinguishment could be the State.<sup>3</sup>

The Second proviso means that the law must make a provision for the acquisition by the State of an estate. But what is the true meaning of the expression "acquisition by the State" of an estate. In *Ajit Singh v. State of Punjab*<sup>4</sup> the Supreme Court held that the words acquisition to the State of an estate" did not have a technical meaning. If the State had in substance acquired all the rights in the land for its own purposes even if the title remained with the owner, it could not be said that it was not acquisition.<sup>5</sup>

#### 26.4. *Jagirs*

The word *Jagir* was meant to cover all grants under which the grantees had only rights in respect of revenue and were not the tilers of the soil. Maintenance grants in favour of persons who were not cultivators, such as the members of a ruling family, would be Jagirs for purposes of Article 31-A.<sup>6</sup>

In the above case the Supreme Court said 'we donot find any sufficient ground for putting a restricted meaning on the word '*Jagir*' in Art. 31-A. At

1. *Ajit Singh v. State of Punjab*, 1967 SC 856 (866-7).

2. *Ibid.*, p. 859-60.

3. *Ibid.*, p. 860.

4. 1967 SC 856 (866).

5. *Ibid.*, p. 861.

6. *Amar Singhji v. State of Rajasthan*, 1955 SC 504 (522).

the time of enactment of that Article the word ~~merely~~ acquired both\*in popular usage and legislative practice a wide connotation and it will be in accord with sound canons of interpretation to ascribe that connotation to that word rather than an archaic meaning to be gathered from a study of ancient tenures.<sup>1</sup>

### 26.5. *Inams*

This word has been defined in Wilson's Glossary : A grant by the British of land for services rendered to them would be grant falling within the Article.<sup>2</sup>

### 26.6. *Estate—meaning of*

The basic concept of the word 'estate' is that the persons holding the estate should be proprietor of the soil and should be in direct relationship with the State paying land revenue to it except where it is remitted in whole or in part. If therefore a term is used or defined in any existing law in a local area which corresponds to this basic concept of "estate" that would be the local equivalent of word "estate" in that area. It is not necessary that there must be an intermediary in an estate before it can be called an estate within the meaning of Art. 31-A (2) (a). It is true that in many cases of estate such intermediaries exist, but there are many holders of small estates who cultivate their lands without any intermediary what-ever. It is not the presence of the intermediary that determines whether a particular landed property is an estate or not ; what determines the character of such property to be an estate is whether it comes within the definition of the word "estate" in the existing law in a particular area or is for the purpose of that area the local equivalent of the word "estate" irrespective of whether there are intermediaries in existence or not."<sup>3</sup>

"The definition of 'estate' refers to an existing law relating to land tenures in a particular area indicating thereby that the Article is concerned only with the land tenure described as an 'estate'. The inclusive definition of the rights of such an estate also enumerates the rights vested in the proprietor and his subordinate tenure holders. The last clause in that definition, viz., that those rights also include the rights or privileges in respect of land revenue, emphasizes the fact that the Article is concerned with land-tenure. It is, therefore, manifest that the said Article deals with a tenure called, "estate" and provides for its acquisition or the extinguishment or modification of the rights of the landholder or the various subordinate tenure-holders in respect of their rights in relation to the estate. The contrary view would enable the State to divest a proprietor of his estate and vest it in another without reference to any agrarian reform."<sup>4</sup>

This decision, in effect, held that Art. 31-A (i) (a) should be confined to an agrarian reform and not for acquiring property for the purpose of giving it to another.<sup>5</sup>

Art. 31-A is a piece of social legislation for agrarian reform. The object of the legislation is to break up the concentration of ownership and control of material resources of the community and to so distribute the same as best to subserve the common good as enjoyed by Art. 39 (b) of the Constitution.

1. *Amar Singh v. State Raj.* 53 SC 504 *State of U.P. v. Anand Brahma Shah*, 1967 SC 661.

2. *Ibid.*, p. 666.

3. *Kannan Devan Hill v. State of Kerala*, 1972 SC 2301 (2313),

4. *Vajravelu v. Sp. Dy Collector*, 1965 SC 1017 (1021).

5. *Ibid.*, p. 1021.

6. *Sasanka v. Union of India*, 1980 SC 522.



It is now well-established that before the protection of Article 31-A can be afforded to the acquisition of any land by the State, the acquisition should be for the purpose of agrarian reform. As observed by Subba Rao, J. speaking for the majority in the case of *Kavalappara Kottarathil Kochuni v. State of Madras*<sup>1</sup> the object of inserting Article 31-A in the Constitution and of subsequently amending it was to facilitate agrarian reforms. It was held in that case that an enactment which sought to regulate the rights of sthanees and the junior members of a Tarwad by depriving the sthance of its properties and vesting them in the tarwad under the Madras Marumakkathayam (Removal of Doubts) Act, 1955 was not a measure of reform.

In *Vajravelu Mudaliar v. Special Deputy Collector*<sup>2</sup> Subba Rao, J. speaking for the Court while reiterating that the object of Article 31-A was to enable the State to implement pressing agrarian reform held that the purpose of slum clearance for which the land was sought to be acquired under the Land Acquisition (Madras Amendment) Act, 1961 could not be related to agrarian reform. It is significant that this Court in that case dealt with the acquisition of land for development of the areas as "neighbourhood" in the city of Madras for housing schemes.

In the case of *Ranjit Singh v. State of Punjab*<sup>3</sup> the Supreme Court dealt with the validity of the East Punjab Holding (Consolidation and Prevention of Fragmentation) Act, the Punjab Gram Panchayat Act and the Punjab Village Common Lands (Regulation) Act and the proceedings taken under these enactments, as a result of which proprietor's interest was acquired by the State without compensation. It was held that the impugned provisions as also the provisions of the Punjab Security of Land Tenures Act were all a part of a general scheme of agrarian reform and the modification of rights envisaged by them had the protection of Article 31-A. Hidayatullah, J. speaking for the Court observed : 'The scheme of rural development today envisages not only equitable distribution of land so that is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few on the other, but envisages also the raising of economic standards and bettering rural health and social conditions. Provisions for the assignment of lands to village Panchayat for the use of the general community, for hospitals, school, manure pits, tanning grounds etc. enure for the benefit of rural population must be considered to be an essential part of the redistribution of holdings and open lands to which no objection is apparently taken. If agrarian reforms are to succeed, mere distribution of land to the landless is not enough. There must be a proper planning of rural economy and conditions and a body like the village Panchayat is best designed to promote rural welfare than individual owners of small portions of lands.

The setting of a body of agricultural artisans, such as the village carpenters, village blacksmiths, the village tanner, farriers wheelwright, barbers, washermen etc. is a part of rural planning and can be comprehended in a scheme as agrarian reforms. It is a trite saying that India lives in villages and schemes to make villages self sufficient can not but be regarded as part of larger reforms, with consolidation of holdings fixing of ceilings on lands, distribution of surplus land and of vacant and wasteland complete.<sup>4</sup>

1. (1960) 3 SCR 887 : 1960 SC 1080

2. (1965) 1 SCR 614 ; 1965 SC 1017.

3. (1965) 1 SCR 82 ; 1965 SC 632 (638).

4. *Ibid.*, p. 638.

In the case of *Balmadies Plantations Ltd. v. State of Tamil Nadu*<sup>1</sup> it was held while dealing with the provisions of Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act that the object and general scheme of the Act was to abolish intermediaries between the State and the cultivator and help the actual cultivator by giving him the status of direct relationship between himself and the State. The Act, as such, in its broad outlines was held to be a measure of agrarian reform and protected by Article 31-A. The acquisition of forests in Janmam Estates was held to be not in furtherance of the objective of agrarian reform and consequently not protected by Article 31-A. The Court in that context observed : "In the absence of anything in the Act to show the purpose for which the forests are to be used by the Government it cannot be said that the acquisition of the forests in Janmam land would be for a purpose related to agrarian reform. The mere fact that the ownership of forests would stand transferred to the State would not show that the object of the transfer is to bring about agrarian reform. Augmenting the resources of the State by itself and in the absence of anything more regarding the purpose of utilisation of those resources, cannot be held to be a measure of agrarian reform. There is no material on the record to indicate that the transfer of forests from the Janmi to the Government is linked in any way with a scheme of agrarian betterment of village economy."

In the case of *Kannan Devan Hills Produce Co. Ltd. v. State of Kerala*<sup>2</sup> the Supreme Court dealt with the provisions of Kannan Devan Hills (Resumption of Lands) Act. One of the questions which arose for determination in that case was whether the three purpose mentioned in Section 9 of the Act, namely :

- (1) reservation of lands for promotion of agriculture
- (2) reservation of land for the welfare of agricultural population ;
- (3) assignment of remaining lands to agriculturists and agricultural labourers ;

were covered by to expression "agrarian reform" and as such the aforesaid provision was protected by Article 31-A of the Constitution. Sikri, C J, while holding that the above objects were covered by the expression "agrarian reform" observed : "It is urged that the wording of the first two purposes in Section 9 is too wide. But if we look at the definition of 'common purpose', which was sustained by the Court in *Ranjit Singh's* case<sup>3</sup> it shows that the purposes sustained thereby would come under either the expression 'promotion of agriculture' or 'welfare of agricultural population in Section 9. Indeed some would fail under both. For instance, reservation of lands for manure pits, waterworks or wells", village water courses or water channels and grazing grounds would promote agriculture ; schools and playgrounds, dispensaries, public latrines etc. would be for welfare of agriculturists. If the State were to use lands for purpose which have no direct connection with the promotion of agriculture or welfare of agricultural population the State could be restrained from using the lands for those purposes. Any fanciful connection with these purposes would not be enough. It seems to us that if we read these two purposes to mean that

1. (1973) 1 SCR 258 : 1972 SC 2240 (2249).

2. (1973) 1 SCR 356 : (1972) 2 SCC 218 (238) : 1972 SC 2301.

3. *Ibid.*, (1972) 2 SCC 218 (218).

4. (1965) 1 SCR 82 : 1965 SC 632.

these include only 'common purposes', which were sustained by this Court and purposes similar thereto it would be difficult to say that they are not for agrarian reform. In a sense agrarian reform is wider than land reform. It includes besides land reform something more and that something more is illustrated by the definition of 'common purpose' which was sustained by this Court in *Ranjit Singh's case*.<sup>1</sup>

In the case of *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*<sup>2</sup> the Supreme Court dealt with the provisions of the Kerala Private Forests (Vesting and Assignment) Act, under which private forest lands situated in the former Malabar district stood transferred to the State. The Act was held to be a measure of agrarian reform and as such protected by Article 31-A. Palekar, J. speaking for the majority in that case observed :

"The objectives of increasing the agricultural production and the promotion of the welfare of the agricultural population are clearly a predominant element in agrarian reform. How these objectives are to be implemented are generally stated in Sections 10 and 11. All the private forests, after certain reservations, are to be assigned to agriculturists or agricultural labourers and to the poorer classes of the rural population desiring bona fide to take up agriculture as a means of their livelihood. The reservation in respect of certain portions of the forests is also made in the interest of the agricultural population because the section says that the reservations will be such as may be necessary for purposes directed towards the promotion of agriculture or welfare of the agricultural population or for purposes ancillary thereto."<sup>3</sup>

Krishna Iyer, J. speaking for himself and Bhagwati, J. agreed with the conclusions of the majority and observed :

"Once we accept the thesis that development orientation and distributive justice are part of and inspire activist agrarian reform, its sweep and reach must extend to cover the needs of the village community as well. What programme of agrarian reform should be initiated to satisfy the requirement of rural uplift in a particular community under the prevailing circumstances is a matter for legislative judgment".<sup>4</sup>

In *Kh. Fida Ali v. State of J. & K.*<sup>5</sup> this Supreme Court held that the provisions of the Jammu and Kashmir Agrarian Reforms Act were protected by Article 31A. Goswami, J. observed :

"From a review of the foregoing provisions it is obvious that the Act contains a clear programme of agrarian reforms in taking stock of the land in the State which is not in personal cultivation (Section 3) and which thought in personal cultivation is in excess of the ceiling area (Section 4). A ceiling area is fixed for land or orchards or both measuring 12 1/2 standard acres. After the land vests in the State, in accordance with the provisions of the Act, a provision is made for disposal of the surplus land in accordance with the rules'.

In *Godavari Sugar Mills v. S. B. Kamble*.<sup>6</sup> Khanna, J. said : "The following principles can be inferred from the decided case in order to find whether an impugned enact for acquisition of land is protected by Article 31-A."

1. (1965) 1 SCR 82 : 1965 SC 632.

2. (1974) 1 SCR 671 : 1973 SC 2734.

3. *State of Kerala v. Gwalior Rayon Silk (Mfg.) Wvg Co.*, (1973) 2 SCR 713 : (1974) 3 SCL 671 : 1973 SC 2734.

4. (1973) 2 SCC 713 : (1974) 1 SCR 671 : 1973 SC 2734 (2743).

5. (1974) 2 SCC 253 : 1974 SC 1522 (1557).

6. (1975) 1 SCC 696 (712).

(1) Acquisition of land by the State in order to enjoy the protection of Article 31-A should be for the purpose of agrarian reform.

(1) Acquisition of land by taking it from a senior member of the family and giving it to a junior member is not a measure of agrarian reform.

(3) Acquisition of land for urban slum clearance or for a housing scheme in neighbourhood of a big city is not a measure of agrarian reform.

(4) Acquisition of land by the State without specifying the purpose for which land is to be used is not a measure of agrarian reform.

(5) Schemes of rural development envisage not only equitable distribution of land but also raising of economic standards and bettering of rural health and social conditions in the villages. Provision for the assignment of land to a Panchayat for the use of the general community or for hospitals, schools manure pits, tanning grounds enure for the benefit of the rural population and as such constitute a measure of agrarian reform.

(6) Provision for reservation of land for promotion of agriculture and for the welfare of agricultural population constitutes a measure of agrarian reform. Agrarian reform is wider than land reform.

(7) If the dominant general purpose of the scheme is agrarian reform, the scheme may provide for ancillary provisions to give full effect to the scheme.

(8) A provision fixing ceiling area and providing for the disposal of surplus land in accordance with the rules is a measure of agrarian reform.<sup>1</sup>

The broad objective of any legislating to agrarian reforms are materially four viz. (1) to maximise agricultural output and productivity ; (2) a fair and equitable distribution of agricultural income ; (3) increase in the employment of opportunities and (4) a social or ethical order.<sup>2</sup>

Art. 31-A of the Constitution does not protect legislation which does not relate to agrarian reform.<sup>3</sup> The Article 31-A saves laws which provide for matters mentioned in clause (a) to (e) thereof from a challenge under Article 14, or 31 notwithstanding anything contained in Article 13 of the Constitution.

## 26. 7. Personal Cultivation.

Article 31-A Proviso provides that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.<sup>4</sup>

Secondly, the proviso says that not only the land exempted from acquisition should be within the ceiling limits but it also must be under personal cultivation. The underlying idea of this proviso seems to be that a person who is cultivating land personally, which is his source of livelihood, should not be deprived of that land under any law protected by Article 31-A unless at least compensation at the market rate is given.<sup>5</sup>

1. *Godawari Sugar Mills v. Kambale*, (1975) 1 SCC 696 (713).

2. *Sasanka v. Union of India*, (1980) 4 SCC 716 (725).

3. *Prag Ice and Oil Mills v. Union of India*, 1978 SC 1296 (1309).

4. *Constitution of India*, Art. 31-A (Proviso).

5. *Ajai Singh v. State of Punjab*, 1967 SC 856 (860).

*Pritam Singh v. State of Punjab*<sup>1</sup> did not lay down that the ceiling limit applicable to each individual must be uniform or that it must be contained in a single statutory provision directly dealing with ceiling limits. The ceiling limit may vary from individual to individual. These varying limits may result from the combined effect of several provisions.

### 26.8. *Ceiling—Second Proviso.*

The prescription of different ceiling limits for different individual, differently circumstanced could be enacted directly by a single provision dealing with individual ceiling limits or alternatively, it could be the consequence of several provisions dealing with different sets of circumstances are fixed may be reduced.<sup>2</sup>

Section 6 (2) of the Gujarat Agricultural Land Ceiling Act did not either disable a husband or wife from owning or holding their separate properties. It did not merge or destroy their separate legal personalities. It required their separate holdings to be grouped together as though they were held by one person only for the purpose of determining the ceiling limit for each member of a family. It may indirectly have the effect of disabling a member of a family from holding land upto the prescribed ceiling limit for a person holding as an individual. In other word, the result is that such a member of a family will have to be content with a holding less than that of an unmarried individual. It has the effect of making it clear that what have to be grouped together are the separate properties of individuals belonging to families other than what are 'joint families' in law. It takes in and applies to members of families other than undivided Hindu families. It means that married person and their minor children will have to be viewed as though they hold one lot together even though they retain their separate legal personalities and remain competent owners of their separate holdings. It does not affect either their legal status or competence. It does reduce their individual holdings.

By virtue of the second proviso to Article 31-A (1) land within the ceiling limit is expressly protected against acquisition by the State unless the law relating to such acquisition provides for compensations which is not less than the market value. In *Kunjukutti v. State of Kerala*<sup>3</sup> it was urged that when the Kerala Land Reforms Act, 1963, as amended by the Kerala Land Reforms (Amendment) Act, 1963 reduced the ceiling limit and required surrender of the land held in excess of the limit fixed by the amending Act without payments of compensations at market value, it violated the constitutional inhibition contained in the Second Proviso. In repelling the contention the Supreme Court said :

"The point in controversy is no longer *res integra*. The question directly came up for consideration in *Kunjukutti v. State of Kerala* (supra) and *Malankara Rubber and Produce Co. v. State of Kerala*.<sup>4</sup> In *Kunjukutti* case (supra) the court disposed of a contention similar to that raised before us. It was urged that when the Kerala Land Reforms Act, 1963, as amended by the Kerala Land Reforms (Amendment) Act, 1969, by Section 82 reduced the ceiling limit and required surrender of the land held in excess of the limit fixed by the Amendment Act, without payment of compensation at market

1. (1967) 2 SCR 536 : 1967 SC 930.

2. \* *Has Mukhlal v State of Gujarat*, 1976 SC 2316 (2321).

3. 1972 SC 2097 : (1973) 1 SCR 326.

4. *Malankara Rubber and Produce Co. v. State of Kerala*, (1973) 1 SCR 399 : (1972) 2 SCC 492, (505).

value, it violated the constitutional inhibition contained in the second proviso to Article 31-A (1). In repelling the contention, it was observed :

*"It was not disputed that the ceiling limit fixed by the amendment Act was within the competence of the legislature to fix ; nor was it contended that the ceiling fixed by the original unamended Act by itself debarred the legislature from further reducing the ceiling limit so fixed. Prior to the amendment undoubtedly no land within the personal cultivation of the holder under the unamended Act within the ceiling limit fixed thereby could be acquired without payment of compensation according to the market value, but once ceiling limit was changed by the amended Act, the second proviso to Article 31-A (1) must be held to refer only to the new ceiling limit fixed by the amended Act. The ceiling limit originally fixed, ceased to exist for future the moment it was replaced by the amended Act. The prohibition contained in the second proviso operates only within the ceiling limit fixed under the existing law at the given time.*

In *Malakara Rubber and Produce Co.*<sup>1</sup> case the court rejected a similar contention based upon the second proviso to Article 31-A (1) observing :

*'Ceiling area' is covered by Section 82. Such area with regard to unmarried persons and families fixed by the 1964 Act was cut down considerably by the Amending Act of 1969. It was . . . that this was hit by the second proviso to Article 31-A (1) inasmuch as the ceiling having once been fixed by the 1964 Act any diminution in the extent thereof would only be justified if compensation at a rate not less than the market value thereof was provided which undoubtedly is not the case here . . . . The contention that reduction in the ceiling area fixed by the 1964 Act had to be compensated for by payment of market value of the difference between the ceiling areas fixed by the two Acts cannot be accepted inasmuch as the 'ceiling limit applicable to him under any law for the time being in force' in Article 31-A can refer only to the limit imposed by the law which fixed it, and not any earlier law which is amended or repealed.*

A similar view was taken by the Supreme Court in *Sasanka Sekhar Maity v. Union of India*.<sup>2</sup>

Agricultural ceiling can be most equitably applied of the base of application is taken as the family unit consisting of husband, wife and the minor children. The Supreme Court in *Waman Rao v. Union of India*<sup>3</sup> held that the adoption of family unit as the unit of application for revised ceilings may cause incidental hardship to minor children and to unmarried daughters. That cannot furnish an argument for assailing the law on the ground that they violated the guarantee of equality, then the true object and intentment was to remove inequalities in the matter of the agricultural holdings.

## 26.9. Rights.

The expression rights in "relation to an estate" is of a very wide amplitude and as such it must receive a very liberal interpretation.<sup>4</sup>

The right of the proprietor of an estate to hold a mela on his land is a "right in the estate" being appurtenant to his ownership of the land.<sup>5</sup> The State and not the ex intermediaries will have the right to hold the mela.

1. (1973) 1 SCR 399 : (1972) 2 SCC 492.

2. (1980) 4 SCC 716.

3. 1981 SC 271 (285),

4. *Sonapur Tea Co. v. Deputy Commissioner*, 1962 SC 137 (140).

5. *State of Bihar v. Rameshwar Balat*, 1961 SC 1649 (1654).

## SAVING OF LAWS PROVIDING FOR ACQUISITION OF ESTATES ETC.

## SYNOPSIS

26.10. Article 31-B to be read with Ninth Schedule.

26.11. Amendments to Acts in Ninth Schedule.

26.12. Control Orders.

26.13. Distinction between Art. 31-A and 31-B.

*31-B Validation of certain Acts and Regulations.....* Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and not withstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continued in force.<sup>1</sup>

**26.10.** *Article 31-B to be read with Ninth Schedule.*

Article 31-B was also introduced by the Constitution (First Amendment) Act, 1951. It validated certain Acts and Regulations by providing that without prejudice to the generality of the provisions contained in Article 31-A, "none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof" shall be deemed to be void or ever to have become void, on the ground that such Act, Regulation or provision was inconsistent with, or took away or abridged any of the rights conferred by, any provisions of Part III and not withstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and right above shall, subject to the power of any competent legislature to repeal or amend it continue inforce."<sup>2</sup>

The Parliament is not required, in the exercise of its constituent power or otherwise, to undertake an examination of the laws which are to receive the protection of Article 31-A. In other words, when a competent legislature passes a law within the purview of clauses (a) to (e), it automatically receives the protection of Article 31-A with the result that the law cannot be challenged on the ground of its violation of Articles 14 and 19. In so far as Article 31-B is concerned, it does not define the category of laws which are to receive its protection, and secondly, going little further than Article 31-A, it affords protection to Scheduled laws against all the provisions of Part III of the Constitution. No Act can be placed in the Ninth Schedule except by the Parliament and since the Ninth Schedule is a part of the Constitution, no additions or alterations can be made therein without complying with the restrictive provisions governing amendments to the Constitution. All the Zamindari Abolition Acts were put in the Ninth Schedule.<sup>3</sup>

Article 31-B of the Constitution was introduced in the Constitution along with Article 31-A by the Constitution (First Amendment) Act, 1951. Article 31-A as originally introduced was confined only to legislation for acquisition of an estate or extinguishment or modification of any rights in a estate and it saved such legislation from attack under Articles 14, 19 and 31. Once legislation falling within this category was protected by Article 31-A, it was not necessary to enact another saving provision in regard to the same kind of legislation.

1. *Constitution of India, Art. 31-B.*

2. *Prag Ice and Oil Mills v. Union of India*, 1978 SC 1296 (1309).

3. *Waman Rao v. Union of India*, 1981 SC 271 (290).

But, presumably, having regard to the fact that the Constitutional law was still in the stage of evolution and it was not clear whether a law, invalid when enacted, could be revived without being re-enacted. Parliament thought that Article 31-A, even if retrospectively enacted, may not be sufficient to ensure the validity of a legislation which was already void by the courts as in *Kameshwar Singh* case, and therefore considered it advisable to have a further provision in Article 31-B to specifically by-pass judgments striking down such legislation. That seems to be the reason why Article 31-B was enacted and statutes falling within Article 31-A were included in the Ninth Schedule. Article 31-B was conceived together with Article 31-A as part of the same design adopted to give protection to legislation providing for acquisition of an estate or extinguishment or modification of any rights in an estate. The Ninth Schedule of Article 31-B was not intended to include laws other than those covered by Article 31-A.<sup>1</sup>

Articles 31-A and 31-B were thus intended to serve the same purpose of protecting legislation falling within a certain category. It was a double-barrelled protection which was intended to be provided to this category of legislation, since it was designed to carry out agrarian reform which was so essential for bringing about a revolution in the socio-economic structure of the country. This was followed by the Constitution (Fourth Amendment) Act, 1956 by which the categories of legislation covered by Article 31-A were sought to be expanded by adding certain new clauses after clause (a).

Article 31-B has to be read along with the Ninth Schedule because it is only those Acts and Regulations which are put in that Schedule that can receive the protection of that Article. The Ninth Schedule was added to the Constitution by Section 14 of the First Amendment Act, 1951. The device or mechanism which Sections 5 and 14 of the First Amendment have adopted is that as and when Acts and Regulations are put into the Ninth Schedule by constitutional amendments made from time to time, they will automatically, by reason of the provisions of Article 31-B, receive the protection of that Article. Items 1 to 13 of the Ninth Schedule were put into that Schedule when the First Amendment was enacted on June 13, 1951. These items are typical instances of agrarian reform legislations. They relate mostly to the abolition of various tenures like *Maleki*; *Taluqdari*, *Mehwassi*, *Khoti*, *Paragana* and *Kulkarni* *Watan*s and of *Zamindaris* and *Jagirs*. The place of pride in the Schedule is occupied by the Bihar Land Reforms Act 1950, which is item No. 1 and which led to the enactment of Article 31-A and to some extent of Article 31-B. The Bombay Tenancy and Agricultural Lands Act, 1948 appears as item 2 in the Ninth Schedule, items 14 to 23 were added by the Fourth Amendment Act of 1955, items 21 to 64 by the 17th Amendment Act 1964, items 65 and 66 by the Twenty-ninth Amendment Act 1964, items 65 and by the Twenty-ninth Amendment Act, 1972, items 67 to 86 by the 34th Amendment Act, 1974, items 88 to 124 by the 39th Amendment Act, 1975 and items 125 to 188 by the 40th Amendment Act, 1976. The Ninth Schedule is gradually becoming densely populated and it would appear that some planning is imperative. But that is another matter.<sup>2</sup>

Thus, Article 31-B read with the Ninth Schedule provides what is generally described as, a protective umbrella to all Acts which are included in the Schedule, no matter of what character, kind or category they may be. Putting it briefly, whereas Article 31-A protects laws of a defined category,

1. *Minerva Mills Ltd. v. Union of India*, 1980 SC 1789:(1980) 3 SCC 625 (683).
2. *Waman Rao v. Union of India*, 1681 SC 271 (289).
3. *Ibid.*, p. 290.



Article 31-B empowers the Parliament to include in the Ninth Schedule such laws as it considers fit and proper to include therein. The 39th Amendment which was passed on August 10, 1975 undertook an incredibly massive programme to include items 87 to 124 while the 40th Amendment, 1976 added items 125 to 188 to the Ninth Schedule in one stroke.<sup>1</sup>

#### 26.10. Amendments to Acts in Ninth Schedule.

The Supreme Court in *Waman Rao's* case (supra) proposed to draw a line, treating the decision in *Keshavanand Bharti's* case.<sup>2</sup> as the land mark. Several Acts were put in the Ninth Schedule prior to the decision in *Keshavanand Bharti's* case on the supposition that the power of the Parliament to amend the Constitution was wide and untrammelled. The theory that the Parliament could not exercise its amending power so as to damage or destroy the basic structure of the Constitution, was propounded and accepted for the first time in *Kesavananda Bharti*. This was one reason for upholding the laws incorporated into the Ninth Schedule before April 24, 1973, on which date the judgment in *Keshavananda Bharti* was rendered. A large number of properties must have changed hands and several new titles must have come into existence on the faith and belief that the laws included in the Ninth Schedule were not open to challenge on the ground that they were violative of Articles 14, 19 and 31. The Supreme Court did not feel justified in upsetting settled claims and titles and in introducing chaos and confusion into the lawful affairs of a fairly orderly society. In so far as the validity of Article 31-B read with the Ninth Schedule was concerned, it was held that all Acts and Regulations included in the Ninth Schedule prior to April 24, 1973 would receive the full protection of Article 31-B. Those laws and regulations would not be open to challenge on the ground that they were inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. Acts and Regulations, which are or will be included in the Ninth Schedule on or after April, 24, 1973 will not receive the protection of Article 31-B for the plain reason that in the face of the judgment in *Kesavananda Bharti*, there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution.

A small, though practically important, clarification seems called for at the end of this discussion of the validity of Articles 31-A, and 31-B. In *Waman Rao's* case the Supreme Court held that laws included in the Ninth Schedule on or after April 24, 1973, will not receive the protection of Article 31-B ipso facto. Those laws shall have to be examined individually for determining whether the constitutional amendments by which they were put in the Ninth Schedule, damage or destroy the basic structure of the Constitution in any manner. The clarification which the Supreme Court desired to make was that such an exercise will become otiose if the laws included in the Ninth Schedule on or after April 24, 1973 fall within the scope and perview of Article 31-C or the unamended Article 31-C. If those laws are saved by these Articles, it would be unnecessary to determine whether they also receive the protection of Article 31-C read with the Ninth Schedule. The fact that Article 31-B confers protection on the Schedule-laws against "any provisions" of Part III and the other two Articles

1. *Waman Rao v. Union of India*, 1981 SC 271 (290).

2. (1973) 4 SCC : 1973 SC 1461.

3. 1981 SC 271.

confer protection as against Articles 14 and 19 only, will make no real difference to this position since, after the deletion of Article 31, the two provisions of Part III, which would generally come into play on the question of validity of the relevant laws, are Articles 14 and 19.<sup>1</sup>

In the case of *Sajjan Singh v. State of Rajasthan*,<sup>2</sup> Gajendragadkar, C.J. speaking for the majority observed : "There is one more point to which we would like to refer. In the case of *Shankari Prasad*<sup>3</sup> the Supreme Court has observed "that the question whether the latter part of Article 31-B is too widely expressed was not argued before it, and so, it did not express any opinion upon it. This question has, however, been argued before us, and so, we would like to make it clear that the effect of the last clause in Article 31-B is to leave it open to the respective Legislature to repeal or amend the Acts which have been included in the Ninth Schedule. In other words, the fact that the said Acts have been included in the Ninth Schedule, a view to make them valid, does not mean that the Legislature in question which passed the said Acts have lost their competence to repeal them or to amend them. That is one consequence of the said provision. The other inevitable consequence of the said provision is that if a Legislature amends any of the provisions contained in any of the said Act, the amended provision would not receive the protection of Article 31-B and its validity may be liable to be examined on the merits."<sup>4</sup>

Such a power can be exercised in respect of an existing Act or Regulation of which the provisions can be scrutinized before it is inserted in the Ninth Schedule. It is for the prescribed majority in each House to decide whether a particular Act or Regulation should be inserted in the Ninth Schedule, and if so, whether it should be so inserted in its entirety or partly. In case the protection afforded by Article 31-B is extended to amendment made in an Act or Regulation subsequent to its inclusion in the Ninth Schedule, the result would be that even those provisions would enjoy the protection which were never scrutinized and could not in the very nature of things have been scrutinized by the prescribed majority vested with the power of amending the Constitution. It would, indeed, be tantamount to giving a power to the State Legislature to amend the Constitution in such a way as would enlarge the contents of Ninth Schedule to the Constitution.<sup>5</sup>

The protection of Article 31-B can also not be extended to a new provision inserted as a result of amendment on the ground that it is ancillary or incidental to the provisions to which protection has already been afforded by including them in the Ninth Schedule. Article 31-B carves out a protected zone. It has inserted Ninth Schedule in the Constitution and give immunity to the Acts, Regulations and provisions specified in the said schedule from being struck down on the ground of infringement of Fundamental Rights even though they are violative of such rights. Article 31-B thus excludes the operation of Fundamental Rights in matters dealt with by those Acts, Regulations and provisions. Any provision which has the effect of making an inroad into the guarantee of Fundamental Rights in the very nature of things should be construed very strictly, and it would not be permissible to widen the scope of such a provision or to extend the frontiers of the protected zone beyond what is

1. *Waman Rao v. Union of India*, 1981 SC 271 (292).

2. 1965 SCR 935 : 1965 SC 845.

3. 1951 SC 458.

4. *Godavari Sugar Mills v. Kamble*, (1975) 1 SCC 696 (708) ; *Sri Ram Narain v. State of Bombay*, (1959) 1 SCR 489 : 1959 SC 459 per Bhargawati, J. *Raman Lal Gulab Chand Shah v. State of Gujarat*, (1969) 1 SCR 42 : 1969 SC 168, per Hidayatullah, C. J., *State of Orissa v. Chandra Shekher*, (1970) 1 SCR 593 : (1969) 2 SCC 334 : 1970 SC 398.

5. *Godavari Sugar Mills Ltd., v Kamble*, (1975) 1 SCC 696 (706) : 1975 SC 1193.

warranted by the language of the provision. No Act, Regulation or provision would enjoy immunity and protection of Article 31-B unless it is expressly made a part of the Ninth Schedule. The entitlement to protection being confined only to the Acts, Regulations and provisions mentioned in the Ninth Schedule, it cannot be extended to provisions which were not included in that schedule. This principle would hold good irrespective of the fact whether the provisions to which entitlement to protection is sought to be extended deals with new substantive matters or whether it deals with matters which are incidental or ancillary to those already protected.<sup>1</sup>

In the case of *State of Maharashtra v. Madhavrao Damodar Patilchand*<sup>2</sup> which was decided between these very parties, a seven Judge Bench of the Supreme Court repelled the contention that Article 31-B does not protect amending Act 12 of 1962 because in the Ninth Schedule to the Constitution only the Maharashtra State Agricultural Lands (Ceiling on Holdings) Act, 1961, had been included and not the amending Act of 1962. Sikri, J. speaking for the Court observed : "But then there are many other Acts which had been amended before they were inserted in the Ninth Schedule, and we can hardly imagine that Parliament intended only to protect the Acts as originally passed and not the amendments made up to the date of their incorporation into the Ninth Schedule. The reason for this express insertion of certain amending Act seems to be that some States, out of abundant caution, recommended that their amending Acts be specifically inserted in the Ninth Schedule. It was further observed : "Accordingly we must hold that Article 31-B protects the impugned Act including the amendments made in it upto the date of its incorporation into the Ninth Schedule".<sup>3</sup>

Considering the nature of the subject-matter which Article 31-B deals with, there is, no justification for extending by judicial interpretation the frontiers of the field which is declared by that Article to be immune from challenge on the ground of violation or abridgement fundamental rights. The Article affords protection to Acts and Regulations specified in the Ninth Schedule. Therefore, whenever a challenge to the constitutionality of a provision of law on the ground that it violates any of the fundamental rights conferred by Part III is sought to be repelled by the State on the plea that the law is placed in the Ninth Schedule, the narrow question to which one must address oneself is whether the impugned law is specified in that Schedule. If it is the provisions of Art. 31-B would be attracted and the challenge would fail without any further inquiry. On the other hand, if the law is not specified in the Ninth Schedule, the validity of the challenge has to be examined in order to determine whether the provisions thereof invade in any manner any of the fundamental rights conferred by Part III. It is thus no answer to say that though the particular law, as for example a Control Order, is not specified in the Ninth Schedule, the parent Act under which the order is issued is specified in that Schedule.<sup>4</sup>

#### 26.11. Control orders not immune.

The Mustard Oil (Price Control) Order, 1977, was passed under Section 3 of the Essential Commodities Act 1955, which by the relevant part of its sub-section (1) empowered the Central Government to provide by an Order for regulating or prohibiting the production, supply and distribution of an essential commodity or trade and commerce therein, if it was of the opinion that it was

1. *Godavari Sugar Mills v. Kamble*, (1975) 1 SCC 676 (707).

2. 1968 3 SCR 712 : 1968 SC 1395.

3. *State of Maharashtra v. Madhaya Rao*, (1968) 3 SCR 714 : 1968 SC 1395 ; *Godavari Sugar Mill v. Kamble*, (1975) 1 SCC 696 (709) : 1975 SC 1193.

4. *Prag Ice and Oil Mills v. Union of India*, 1978 SC 1296.

necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing its equitable distribution and availability at a fair price. Since the Act of 1955 had been placed in the Ninth Schedule, none of its provisions, including of course Section 3 (1), was open to attack on the ground that it ever was or was inconsistent with or took away or abridged any of the rights conferred by any provision of Part III of the Constitution. But that was the farthest that the immunity offered by Article 31-B could go. In other words speaking of a provision directly in point, Section 3 (1) of the Act of 1955 was not open to challenge on the ground, to take a relevant instance that it violated the guarantee contained in Art. 19 (1) (f) or 19 (1) (g) of the Constitution. But there was no justification for extending the protection of that immunity to an order passed under Section 3 of the Act like the Mustard Oil (Price Control) Order. Extending the benefit of the protection afforded by Art. 31-B to any action taken under an Act or Regulation which was specified in the Ninth Schedule, would be an unwarranted extension of the provisions contained in Art. 31-B, neither justified by its language nor by the policy or principle underlying it. When a particular Act or Regulation is placed in the Ninth Schedule, the Parliament may be assumed to have applied its mind to the provisions of the particular Act or Regulation and to the desirability, propriety or necessity of placing it in the Ninth Schedule in order to obviate a possible challenge to its provisions on the ground that they offend against the provisions of Part III. Such an assumption could not, in the very nature of things, be made in the case of an Order issued by the Government under an Act or Regulation which was placed in the Ninth Schedule. The fundamental rights will be eroded of their significant content if by judicial interpretation a constitutional immunity was extended to Orders to the validity of which the Parliament, at least theoretically, had had no opportunity to apply its mind. Such an extension would take for granted the supposition that the authorities on whom power was conferred to take appropriate action under a statute would act both within the framework of the statute and within the permissible constitutional limitations, a supposition which past experience did not justify and to some extent falsified. The upholding of laws by the application of the theory of derivative immunity is foreign to the scheme of our Constitution and accordingly Orders and Notifications issued under Acts and Regulations which are specified in the Ninth Schedule must meet the challenge that they offend against the provisions of Part III of the Constitution. The immunity enjoyed by the Parent Act by reason of its being placed in the Ninth Schedule cannot *proprio vigore* be extended to an off spring of the Act like a Price Control Order issued under the authority of the Act. It is therefore open to the petitioners to invoke the writ jurisdiction of the Supreme Court for determination of the questions whether the provisions of the Price Control Order violate Arts. 14, 19 (1) (f) and 19 (1) (g) of the Constitution.<sup>1</sup>

In the above case reliance was placed justifiably, on two decisions of the Supreme Court in *Vasantlal Maganbhai Sajamwala v. The State of Bombay*<sup>2</sup> and *Latafat Ali Khan v. The State of U. P.*,<sup>3</sup> in support of this argument that the Price Control Order must receive the protection of the Ninth Schedule to the same extent as the Essential Commodities Act under which that Order was issued and which had been placed in the Ninth Schedule. In *Vasantlal Maganbhai*,<sup>4</sup> the vires of Section 6 (2) of the Bombay Tenancy and Agricultural

1. *Prag Ice and Oil Mills v. Union of India*, 1978 SC 1296 (1309, 1310); *Godavari Sugar Mills v. Kamble*, 1975 SC 1193; (1975) 1 SCC 676.

2. (1961) 1 SCR 341; 1961 SC 4.

3. (1971) Suppl. SCR 719; 1973 SC 2870.

4. 1961 SC 4

Lands Act\*, 1948, was challenged on the ground that it suffered from the vice of excessive delegation. In exercise of the power conferred by Section 6 (2), the State Government had issued a Notification fixing the maximum rent payable by tenants of lands situated in the areas specified in the schedule appended to the Notification. The validity of that Notification was challenged on the ground that it offended against Art. 31 of the Constitution. The first contention was rejected by the majority which held that Section 6 (2) did not suffer from excessive delegation. On the second question it was held by the Court that since the Bombay Tenancy Act was placed in the Ninth Schedule, the Notification which was issued under Section 6 (2) of that Act could not be challenged on the ground that it violated Art. 31. Subba Rao, J., who was in minority, did not consider the latter point 'regarding the validity of the Notification under Section 6 (2) because he took the view that section 6 (2) suffered from the vice of excessive delegation and was therefore unconstitutional. This decision undoubtedly lends support to the contention of the Union Government that if an Act or Regulation was specified in the Ninth Schedule, any order or notification issued under it would equally be entitled to the protection of that Schedule. The Supreme Court, however took the view, that the decision in *Vasantlal Maganbhai*,<sup>1</sup> did not reflect the true legal position which, was that the immunity enjoyed by an Act placed in the Ninth Schedule could not be extended to an order or notification issued under it. It was said that the decision of the Court; in *Vasant Lal's* (supra) cease to have been influenced largely by the consideration that the only argument advanced against the validity of the notification was that in substance it amended the provisions of Section 6(1) and was therefore a fresh legislation to which Art. 31-B could not apply. The Court rejected that argument and held that if Section 6 (2) was valid, the exercise of the power validly conferred on the Provincial government could not be treated as a fresh legislation. The decision in *Latafat Ali Khan*<sup>2</sup> contains no reasons beyond the bare statement that : "if a statutory rule was within the powers conferred by a section of a statute protected by Art. 31-B, it was difficult to say that the rule must further be scrutinised under Articles 14, 19. etc." The Supreme Court in *Prag Ice and Oli Mills*<sup>3</sup> case said: "It is clear from the judgment that since the Court was of the opinion that "at any rate" the impugned provisions of the U. P. Imposition of Ceiling on Land Holdings Act and the Rules were part of a scheme of land reform and were therefore pre-empted from attack under Art. 31-A of the Constitution, it did not think in necessary to examine the question whether statutory rules framed under the Act which was placed in the Ninth Schedule would enjoy the same immunity.

#### 26.12. *Distinction between Art. 31-A and 31-B.*

The necessity for pointing out this distinction between Articles 31-A and 31-B is the difficulty which may apparently arise in the application of the principle of *stare decisis* in regard to Article 31-B read with the Ninth Schedule, since that doctrine has been held not to apply to Article 31-A. The fourth reason given by the Supreme Court for not applying the rule of *stare decisis* to Article 31-A is that any particular law passed under Clauses (a) to (e) can be accepted as good if it has been treated as valid for a long number of years but the device in the form of the Article cannot be upheld by the application of that rule. The court applied the Article 31-B read with the Ninth Schedule the self-same test.<sup>4</sup>

1. 1961 SC 4.

2. 1973 SC 2070.

3. 1978 SC 1296.

4. *Waman Rao v. Union of India*, 1981 SC 271 (291).

## SAVING OF LAW GIVING EFFECT TO CERTAIN DIRECTIVE PRINCIPLE

### SYNOPSIS

26.13. Article 31-C.

26.14. Nexus.

26.15. Compensation.

Article 31-C of the Constitution was inserted by Section 8 of the Constitution (Twenty fifth amendment) Act, 1971. It reads :

*31-C Saving of laws giving effect to certain directive principles.—Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principle specified in clause (b) or clause (c) of Art. 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14 or Article 19 ; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.*

Provided that where such law is made by the legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the *President*, has received his assent.<sup>1</sup>

The validity of Article 31-C as introduced in the Constitution by Section 4 and 55 of the Constitution (Forty-two Amendment Act), 1976 was challenged in *Minerva Mills Ltd.*<sup>2</sup> The majority judgment was delivered by Chandrachud, C. J. on behalf of himself and on behalf of Gupte, Untwalia, Kailasam, JJ. Bhagwati, J. gave a dissenting judgment.<sup>3</sup>

The challenge rested on the ratio of the majority judgment in *Kesavananda Bharati's* case.<sup>4</sup> There judgments were delivered by Sikri, C. J., Shelat and Grover JJ. Hegde and Mukherjee, JJ., Jaganmohan Reddy and Khanna, J.

The first portion of Art. 31-C gave protection to a defined and limited category of laws which were passed for giving effect to the policy of the State towards securing the principles specified in Cl. (b) or Clause (c) of Article 39. These clauses of Article 39 contained directive principles which were vital to the well-being of the country and the welfare of its people. Whatever was said in respect of the defined category of laws envisaged by Article 31-A held good, perhaps with greater force, in respect of laws passed for the purpose of giving effect to Cls. (b) and (c) of Article 39. It was impossible to conceive that any law passed for such a purpose could at all violate Article 14 or Article 19.

1. *Constitution of India*, Art. 31-C.

2. (1980) 3 SCC 639.

3. (1973) Supt. SCR 1 : 1973 SC 1461.

4. (1973) 4 SCC 225.

Article 31 was out of harm's way. In fact, far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to directive principles contained in Cls. (b) and (c) of Art. 39 would fortify that structure.

The Supreme Court in *Keshavanand Bharti's* case considered the Constitutionality of this Amendment.

Sikri, C. J. held that Section 3 of the Constitution (25th Amendment) Act was void as it delegated the power of the legislature to amend the Constitution. According to him Art. 31 (c) in effect enabled the states to adopt any policy they liked and abrogate Articles 14, 19 and 31 of the Constitution at will.<sup>2</sup>

According to Shelat and Grover, JJ. the validity of section 3 could not be sustained because it enabled the abrogation of the basic elements of the Constitution in as much as the fundamental rights contained in Articles 14, 19 and 31 could be completely taken away.<sup>3</sup> Hedge and Mukherjee, JJ. held that as Article 31-C permitted the destruction of some of the basic features of the constitution it was void.<sup>4</sup> Jagan Mohan Reddy, J. upheld the validity of the first portion of Art. 31-C but the portion "and no law containing a declaration that it is for giving effect to such policy shall be questioned in any court on the ground that it does not give effect to such policy" which could be severed from the first portion, was void.<sup>5</sup>

Palekar, Dwivedi, Mathew, and Chandrachud, JJ. upheld the validity of the whole of Article 31-C. Khanna, J. took the view that the first Part of Art. 31-C was valid but the second part was *ultra vires*.

As regards the first part Khanna, J. said : "Once, a law contains such a declaration, the declaration would stand as bar and it would not be permissible for the Court to find whether the impugned law is for giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39 and at the same time provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy".<sup>6</sup>

If a law contains the declaration contemplated by Article 31-A, it would have complete protection from being challenged on the ground of being violative of Articles 14, 19 and 31 of the Constitution, irrespective of the fact, whether the law is or is not for giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39.<sup>7</sup>

With regard to second part Khanna, J. said : "The position under Article 31-C is that though judicial review has been excluded by the authority making the constitutional amendment, the law in respect of which the judicial review has been excluded is one yet to be passed by the legislatures. Although the object for which such a law can be enacted has been specified in Article 31-C, the power to decide as to whether the law enacted is for the attainment of that object has been vested not in the courts but in the very legislature which

1. *Kesavanda Bharti v. State of Kerala*, (1973) 4 SCC 225 (395).

2. *Ibid.*, p. 395.

3. *Ibid.*, p. 463.

4. *Ibid.*, p. 509.

5. *Ibid.*, p. 667.

6. *Keshavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (819) : 1973 SC 1014.

7. *Ibid.*, p. 813.

passes the law. The vice of Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The kind of limited judicial review which is permissible under Article 31-A for the purpose of findings as to whether the law enacted is for the purpose mentioned in Article 31-A has also been done away with under Article 31-C. The effect of the declaration mentioned in Article 31-C is to grant protection to the law enacted by a legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the court to have not been enacted for the objects mentioned in Article 31-C. Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State legislature, contemplated by Article 31-C, strikes at the basic structure of the Constitution. The second part of Article 31-C thus goes beyond the permissible limit of what constitutes amendment under Article 368.<sup>1</sup>

The view of the majority signed by Sikri, C. J., Shelate, Hegd, Grover, Jagan Mohan Reddy, Palekar, Khanna, Mukherjee and Chandrachud, JJ. was that the first para of section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971 was valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the points that it does not give effect to such policy" was invalid. This part having been declared by the majority to be unconstitutional must consequently be treated as *nonest*."

The unamended Article 31-C was to the extent to which it was upheld in *Keshavanand Bharti's* case (supra) was held to be constitutionally valid in *Waman Rao v. Union of India*.<sup>2</sup>

Section 4 of the 42nd Amendment which was brought into force with effect from January 3, 1977 amended Article 31-C of the Constitution by substituting the words and figures "all or any of the principle laid down in part IV" for the words and figures "principles specified in clause (b) or clause (c) of Article 39 after its amendment read would : Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing all or any of the principle laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19, or Article 31 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy. This latter portion had been declared unconstitutional in *Keshavanand Bharti's* case.

It is manifest that the scope of law which fell within Article 31-C had been expressly varied by the amendment. Whereas under the original Article 31-C, the challenge was excluded only in respect of law giving effect to the policy of the state towards securing the principles specified in clause (b) or clause (c). Article 39 under the amendment all laws giving effect to the policy of the state towards securing "all or any of the principles laid down in Part IV", are saved from a constitutional challenge under Articles 14 and 19. The reference to Article 31 was deleted by the 44th Amendment as a consequence of the abolition of the right to property as a fundamental right.

1. *Keshavananda Bharti v. State of Karala*, 1973 (4) SCC 225 (819)

2. (1980) 3 SCC 587 : 1981 SC 271.

3. (1980) 3 SCC 625 : 1980 SC 789.



In *Minerva Mills Ltd. v. Union of India*<sup>1</sup> the question for consideration before the Supreme Court was whether section 4 of the 42nd Amendment had brought about a result which was basically and fundamentally different from the one arising under the unamended Article. If the amendment did not bring about any such result its validity would have to be upheld for the same reasons for which the validity of the unamended Article was upheld.

In *Waman Rao's*<sup>2</sup> case the Supreme Court expressly held that the unamended Article 31-C did not damage any of the basic or essential features of the constitution or its basic structure. And on that basis Bhagwati, J. in his dissenting judgment said that it was difficult to appreciate how the amended Article 31-C could be said to be violative of the basic structure.

The question in *Minerva Mills v. Union of India*<sup>3</sup> was whether this amendment was on that account destructive of the basic structure of the Constitution. Chandrachud, C. J. speaking for the majority said: (Gupte, Untwalia and Kailasam).

"The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation bring out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution".<sup>4</sup>

The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.<sup>5</sup>

Article 31-C begins with a non-obstante clause by putting Article 13 out of harm's way. It provides for a certain consequence notwithstanding any thing contained in Article 13. It then denudes Articles 14 and 19 of their functional utility by providing that the rights conferred by these Articles will be no barrier against passing laws for giving effect to the principles laid down in Part IV. On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31-C.<sup>6</sup>

For these reasons the Supreme Court held that Section 4 of the Constitution (Forty-Second Amendment) Act was beyond the amending power of

1. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (654).

2. *Waman Rao v. Union of India*, 1981 SC 271 : (1980) 3 SCC 587.

3. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (654-655) : 1980 SC 1789.

4. *Ibid.*, p. 654.

5. *Ibid.*, p. 654.

6. *Ibid.* p. 655.

the Parliament and was void since it damages the basic or essential features of the Constitution and destroyed its basic structure by a total exclusion of challenge to any law on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law was for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution.<sup>1</sup>

Bhagwati, J. in his dissent said : "If the exclusion of the fundamental right embodied in Articles 14 and 19 could be legitimately made for giving effect to the directive principles set out in clauses (b) and (c) of Article 39 without affecting the basic structure, I fail to see why these fundamental rights cannot be excluded for giving effect to the other directive principles. If the constitutional obligation in regard to the directive principles set out in clauses (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the fundamental rights under Articles 14 and 19, there is no reason in principle why such precedence cannot be given to the constitutional obligation in regard to the other directive principles which stand on the same footing."<sup>2</sup>

Bhagwati, J., further observed : "I find it difficult to understand how it can at all be said that the basic structure of the Constitution is affected when for evolving a *modus vivendi* for resolving a possible remote conflict between two constitutional mandates of equally fundamental character, Parliament decides by way of amendment of Article 31-C that in case of such conflict the constitutional mandate in regard to directive principles shall prevail over the constitutional mandate in regard to the fundamental rights under Articles 14 and 19. The amendment in Article 31-C far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order".<sup>3</sup>

"But so far as Section 4 of the 'Constitution (Forty-Second Amendment) Act, 1976 is concerned", said Bhawati, J. "I hold that, on the interpretation placed on the amended Article 31-C by me, it does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and I would therefore, declare the amended Article 31-C to the constitution as valid".<sup>4</sup>

A petition to review the judgment in the *Minerva Mills*, case (supra) was filed and is still pending. But before the decision of this review application a similar question arose before the Supreme Court in *Sajjan Coke Manufacturing Co. v. Bharat Coking Coal Ltd.*<sup>5</sup> This case was heard by a Constitution Bench. Chinappa Reddy, J. speaking for the court said that he broadly agreed with Bhagwati, Venkataramaiah Bahurul Islam and A. N. Sen, JJ. He particularly invited to the following observation of Bhagwati, J. "It will, therefore, be seen that if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of

1 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (692-93).

2. *Ibid.*, p. 714.

3. *Ibid.* p. 713.

4. *Ibid.* p. 718.

5. 1983 SC 239 (248).

equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of more formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice. The dynamic principle of egalitarianism fertilises the concept and social and economic justice ; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a Directive Principle with a view to promoting social and economic justice, it would be difficult to say that such law violates the principle of egalitarianism and is not in accord with the principle of equality before the law as understood not in its strict and formalistic sense, but in its dynamic and activist magnitude. In the circumstances, the Court would not be unjustified in making the presumption that a law enacted really and genuinely for giving effect to a Directive Principle in furtherance of the cause of social and economic justice, would not infringe any Fundamental Right under Article 14 or 19".....If this be the correct interpretation of the constitutional provisions, as I think it is, the amended Article 31-C does no more than codify the existing position under the constitutional scheme by providing immunity to a law enacted really and genuinely for giving effect to a Directive Principle, so that needlessly futile and time consuming controversy whether such law contravenes Articles 14 or 19 is eliminated." The Court further observed "Now the question is what should be the test for determining whether a law is enacted for giving effect to a Directive Principle. One thing is clear that a claim to that effect put forward by the State would have no meaning or value ; it is the court which would have to determine the question. Again it is not enough that there may be some connection between a provision of the law and a Directive Principle. The connection has to be between the law and the Directive Principle and it must be a real and substantial connection. To determine whether a law satisfies this test, the Court would have to examine the pith and substance, the true nature and character of the law as also its design and the subject matter dealt with by it together with its object and scope. If on such examination, the Court finds that the dominant object of the law is to give effect to the Directive Principle, it would accord protection to the law under the amended Article 31-C. But if the Court finds that the law though passed seemingly for giving effect to Directive Principle is, in pith and substance, one for accomplishing and unauthorised purpose—unauthorised in the sense of not being covered by any Directive Principle, such law would not have the protection of the amended Art. 31-C".

"The point I wish to emphasize is that the amended Article 31-C does not give protection to a law which has merely some remote or tenuous connection with a Directive Principle. What is necessary is that there must be a real and substantial connection and the dominant object of the law must be to give effect to the Directive Principle, and that is a matter which the Court would have to decide before any claim for protection under the amended Article 31-C can be allowed".

"Whether therefore, protection is claimed in respect of a statute under the amended Article 31-C, the Court would have first to determine whether there is real and substantial connection between the law and a Directive Principle and the pre-dominant object of the law is to give effect to such Directive Principle and if the answer to this question is in the affirmative, the

Court would then have to consider which are the provisions of the law basically and essentially necessary for giving effect to the Directive Principle and give protection of the amended Article 31-C only to those provisions. The question whether any particular provision of the law is basically and essentially necessary for giving effect to the Directive Principle, would depend, to a large extent, on how closely and integrally such provision is connected with the implementation of the Directive Principle. If the Court finds that a particular provision is subsidiary or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that, though seemingly a part of the general design of the main provisions of the statute, its dominant object is to achieve an unauthorised purpose, it would not enjoy the protection of the amended Article 31-C and would be liable to be struck down as invalid if it violates Article 14 or 19".

"While we are agree with Bhagwati, J.", Chinappa Raddy, J. said "that the object of the law must be to give effect to the Directive Principle and that the connection with the Directive Principle must not be 'some {remote or tenuous connection', we deliberately refrain from the use of the words 'real and substantial', 'dominant, basically and essentially necessary' and 'closely and integrally connected', lest anyone chase after the meaning of these expressions, forgetting for the moment the words of the statute, as happened once when the words 'substantial and compelling reasons' were used in connection with appeals against orders of acquittal and a whole body of literature grew up on what were 'substantial and compelling reasons. As we have already said, we agree with much that has been said by Bhagwati, J. and what we have now said about the qualifying words is only to caution ourselves against adjectives getting the better of the noun. Adjectives are attractive forensic aids but in matter of interpretation they are diverting intruders. These observations have the full concurrence of Bhagwati, J."

"We are firmly of the opinion" said the Court "that where Article 31-C comes in Article 14 goes out. There is no scope for bringing in Article 14 by a side wind as it were, that is, by equating the rule of equality before the law of Article 14 with the broad egalitarianism of Article 39 (b) or by treating the principle of Article 14 as included in the principle of Article 39 (b). To insist on nexus between the law for which protection is claimed and the principle of Article 39 (b) is not to insist on fulfilment of the requirement of Art. 14. They are different concepts and in certain circumstances, may even run counter to each other. That is why the need for the immunity afforded by Art. 31-C. Indeed there are bound to be innumerable cases where the narrower concept of equality before the law may frustrate the broader egalitarianism contemplated by Art. 39 (b). To illustrate, a law which prescribes that every landholder must surrender twenty per cent of his holding as well as a law which prescribes that no one shall hold land in excess of 20 acres, may both satisfy the ritual requirements of Article 14. But clearly, the first would frustrate and the second would advance the broader egalitarian principle. We are, therefore, not prepared to accept the submission that any law seeking the protection of Art. 31-C must not be a law founded on discrimination".<sup>1</sup>

### 25.13. Nexus.

In *Minerva Mills v. Union of India*,<sup>2</sup> Chandrachud, C.J., while referring to the ratio of *Keshvanand Bharti's*<sup>3</sup> case on the unamended Art. 31-C had

1. *Sanjeev Coke Mfg. Co. v. Bharat Cooking Coal Ltd.*, 1973 SC 239 (250).
2. 1980 SC 1789 (1810) : (1981) SCR 206 (261).
3. 1973 SC 1467.

observed 'Indeed if there is one topic on which all the thirteen Judges in *Keshvanand Bharti* were agreed it was this : that the only question open to the judicial review under the unamended Art. 31-C was whether there was a direct and reasonable *nexus* between the impugned law and the provisions of Art. 39 (b) and (c). Reasonableness is regarding the law'.<sup>1</sup>

In *State of Tamil Nadu v. Abu Kavur Bai*<sup>2</sup> it was emphasised by the Supreme Court that there should be a close *nexus* between the statute passed by the legislature and the twin object as mentioned in the clauses (b) and (c) of Art. 39. In approaching this problem and considering the question of *nexus*, Fazal Ali, J, said that the approach ought not to be made because the courts should interpret a constitutional provision in order to suppress the mischief and advance the Act. The doctrine of *nexus* can not be extended to such an extreme limit that the very purpose of Art. 39 (b) and (c) is defeated. By requiring that there should be *nexus* between the law and Article 39 (b) and (c) what is meant is that there must be a reasonable connection between the Act passed and the object mentioned in Art. 39 (b) and (c). Before the said Article can apply, if the *nexus* is present in the law then the protection of Article 31-C becomes complete and irrevocable.<sup>3</sup>

The fact that there is a declaration in the Act regarding the purpose mentioned in Article 39 (b) and (c) may generally be evidence of the *nexus* between the law and the objects of Articles 39 (b) and (c). In *Karnataka's*<sup>4</sup> case Iyer, J. had also observed that the requisite declaration contemplated in Article 31-C is made in the Preamble and other sections of the Act. The *nexus* between the taking of property and the public purpose springs necessarily into existence if the former is capable of answering the latter'.

There is no particular magical or ritualistic formula in the term '*nexus*' which may be closed in a strait jacket. Even a rationalisation scheme meant for the purpose of distribution or preventing concentration of wealth, would be sufficient *nexus* to attract the operation of Art. 39 (b) and (c).<sup>5</sup>

#### 26.14. *Compensation.*

On a proper interpretation of Article 31-C, the question of compensation becomes totally irrelevant. If once the conditions mentioned in Article 31-C are fulfilled by law, no question of compensation arises because the said Article expressly excludes not only Articles 14 and 19 but also 31, which by virtue of Twentyfifth Amendment, had replaced the word '*amount*' for the word '*compensation*'. In *Waman Rao's*<sup>6</sup> case Chandrachud, CJ, had said that once Article 31-C was attracted Article 14, 19 and 31 were out of harm's way'.

1. *Waman Rao v. Union of India*, (1981) 2 SCR 1 (41) : 1981 SC 271 (292).

2. 1984 SC 326 (333).

3. *Ibid.* p. 333.

4. *State of Karnataka v. Union of India*, 1978 SC 68 (215).

5. *State of Tamil Nadu v. Abu Kavur Bai*, 1984 SC 326 (333); *Madhu Sudan Singh v. Union of India*, (1984) 2 SCC 381 (390).

6. *Waman Rao v. Union of India*, (1981) 2 SCR (413) : 1981 SC 271 (292).

## Federalism in the Constitution

### SYNOPSIS

- 27.1. Federalism---Meaning of.
- 27.2. Federal Theory.
- 27.3. Sovereignty in Federal System.
- 27.4. Federal responsibility.
- 27.5. Indian Federalism.
- 27.6. Government of India not strictly Federal.
- 27.7. Constitutional provisions.
- 27.8. Federation and Unitary System.

#### 27.1. *Federalism—Meaning of.*

Federalism and its kindred terms—e. g. 'Federal'—are used, most broadly, to describe the mode of political organization which unites separate polities within an overarching political system so as to allow each to maintain its fundamental political integrity. Federal systems do this by distributing power among general and constituent governments in a manner designed to protect the existence and authority of all the governments.<sup>1</sup>

According to Freeman the two requisites seemed necessary to constitute a Federal government in its most perfect form. On the one hand, each of the members of the Union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively. Each member is perfectly independent within its own sphere, but there is another sphere in which its dependence, or rather its separate existence vanishes".<sup>2</sup>

Wheare has defined the 'federal principle' as meaning the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent.<sup>3</sup>

What is necessary for the federal principle is not merely that the general governments should operate directly upon the people, but further that each government should be limited to its own sphere and within that sphere should be independent of the other.<sup>4</sup> In a federal government both general and regional governments operate directly upon the people whereas in a league or

1. *International Encyclopedia of Social Sciences*, Vol. 5 p. 353.

2. Freeman : *The History of Federal Government*, p. 3.

3. K. C. Wheare : *Federal Government*, 4th ed, p. 10.

4. *Ibid.* p. 14.

confederation it is the regional or state governments alone which operate directly upon the people ; the general government operates only upon the regional governments.<sup>1</sup> This is the fundamental and distinguishing characteristic of the confederation. In the case of a federation the fundamental principle is that general and regional governments are co-ordinate.<sup>2</sup>

A federal government is a form of government in which the political power is divided between the central and the local governments, so that each of them is, within its own sphere, independent of the other.

The view of Wheare was criticised by Birch. He pointed to the tremendous growth of concurrent powers in federal system at the end of the nineteenth century and during the twentieth century, and suggested that the overlapping of government functions was so great that to suggest that the two levels of government were in fact restricted to separate sphere was quite un-realistic. Birch suggested, therefore, that the definition could be shortened by the omission of the requirements that each level of government be restricted to its own sphere : "A federal system of government is one in which there is a division of powers between one general and several regional authorities, each of which, in its own sphere, is co-ordinate with the others."<sup>3</sup>

In 1956 Lington argued that "federal institutions are significant only if they reflect a diversified society, and that the difference between societies in this respect is a matter of degree." "Federalism is thus not an absolute but a relative term ; there is no identifiable point at which a society ceases to be unified and becomes diversified. All communities fall somewhere in a spectrum which runs from what we may call a theoretically wholly integrated society at one extreme to a theoretically wholly diversified society at the other."<sup>4</sup>

At attempt to define federalism must take into account the fact that political systems are constantly changing what was a federal system at one point of time may become something rather different by a process of gradual change.

## 27.2. Federal Theory.

Federal theory was developed largely during the nineteenth century, and many of the criticisms which are made of federalism arise because in important respects it is considered not to be compatible with the greater demands made on government in the twentieth century. In the early days of federalism the part played by government in people's lives was small. The activities of government were comparatively simple. It was concerned with only a limited range of domestic matters ; the major preoccupation was often foreign affairs. In those circumstances it was possible to divide sovereignty neatly between federal and provincial governments. There was unlikely to be much conflict between the mainly foreign and defence responsibilities of the federal government and the mainly domestic responsibilities of the provincial governments. To all intents and purposes those matters which affected people from day to day could be fully controlled at the provincial level.<sup>5</sup>

1. Wheare : *Federal Government*, p. 13-14.

2. *Ibid.*, p. 14.

3. *Federalism Finance & Social Legislation*, Oxford, 1955, p. 306.

4. William S. Lington : *Federalism and Constitutional change*, Oxford, 1956 p. 4.

5. *Royal Commission on the Constitution*, p. 154.

Since that time, however, important changes have taken place. Largely due to public demand there has been an enormous increase in the responsibilities of government. There have been developments in ideas about social justice. It is now widely accepted that governments should do a great deal to help the needy and to ensure a large measure of equality in public services and general standards of living. And there has recently been a growth of international co-operation which has led to an increase in the numbers and scope of international agreements; these now tend to cover subjects which, in a federal state, would formerly have been regarded as purely provincial matters.<sup>1</sup>

### 27.3. Sovereignty in Federal system.

In a federal system sovereignty is divided between two levels of government. The federal government is sovereign in some matters and the provincial governments are sovereign in others. Each within its own sphere exercises its power without control from the other, and neither is subordinate to the other. It is this feature which distinguishes a federal from a unitary constitution. In the latter all sovereignty rests with the central government; if provincial governments exist, they are subordinate authorities, deriving their power from the central legislature, which may overrule them at any time by the ordinary legislative processes.<sup>2</sup>

The allocation of functions between federal and provincial governments is set out in a written constitution. This may specifically enumerate the functions of the federal government and assign the residue of government functions to the provinces, as in the United States and Australia, or it may enumerate the provincial functions and leave the residual functions to the federal government, as in Canada.<sup>3</sup>

“As a result of these changes the federal idea of divided sovereignty is becoming difficult to sustain. Provincial governments can no longer keep *de facto* control over all the matters which are constitutionally their sole responsibility. Their sovereignty is being eroded because their electorates are demanding more than can be provided without federal help. In most federations, therefore, power is fast gravitating to the centre. The entrenchment of provincial sovereignty in federal constitutions has not prevented this. It has been overcome either by the transfer of provincial powers to the federal government through changes in the constitution or, more usually, by elaborate measures of co-operation between the provincial and federal governments which in theory leave the province's powers intact but which in practice put the federal government in a largely controlling position. In short, to make federalism work in modern conditions federal countries have been compelled to take steps which tend to undermine the principle of Provincial sovereignty on which the system itself is based. What is actually in operation is not true federalism. Prof. Vile suggests that in the United States the concentration of power at the centre has become so great that the country may be moving out of a system of federalism into one of decentralised unitary government.”<sup>4</sup>

This general growth in the responsibilities of federal governments is illustrated by their increasing involvement, in domestic matters such as education, law enforcement and urban development, all traditionally provincial

1. Royal Commission on Constitution, p. 154.

2. Royal Commission on Constitution, p. 152 para 502.

3. *Ibid.* p. 152-53 para 505.

4. Report of Royal Commission on the Constitution, 1969 Vol. 1 para 513.



responsibilities. They are also increasingly taking on responsibility for social security which is not only a very costly service for provincial governments to provide but also one in which comparisons may easily be made between standards in one province and those in another. And federal governments are playing an increasingly important part in the internal economic development of their provinces.<sup>1</sup>

The immediate cause of greater federal involvement is often a shortage of provincial funds. Provincial governments, in order to discharge their constitutional functions in the ways now demanded by their electorates, tend to require more money than is available to them from sources provided under the constitution. They are therefore compelled to turn to the federal government for a re-allocation of revenues for direct financial help from federal funds. Not infrequently federal help reaches them in a way which undermines their independence. One of the chief obstacles to the proper working of federalism in modern conditions is the impracticability of arranging a division of finance between the federal and provincial governments which will for any length of time satisfactorily match their respective functions under the constitution.<sup>2</sup>

#### 27.4. *Federal responsibilities.*

Federal responsibilities have also tended to grow because of the increasing interest in equalisation. Any arrangement for equalising the standards of public services or general economic conditions between the richer and poorer provinces has normally to be supervised from the centre. The need for such equalisation, entirely contrary in spirit to the original federal concept of provincial autonomy, is now widely acknowledged in federations, although the extent to which it is satisfied still varies a great deal.<sup>3</sup>

In various ways, therefore, changes in the objectives of government are tending to result in the by-passing of provincial sovereignty. Yet this adjustment of federalism to modern requirements is generally achieved only with difficulty. The formal division of sovereignty between the federal and provincial governments tends to slow down desirable change and may even prevent it altogether. Where sovereign rights are at stake agreement to change may not be easy to reach. Negotiations for a new allocation of functions or sources of revenue between the federation and the provinces can be long drawn out.<sup>4</sup>

It is widely accepted that even at its best federalism is an awkward system to operate. It depends a great deal on co-operation between governments. Even in countries where it has worked satisfactorily this is not because of its intrinsic merits but because those concerned with government have been successful in overcoming its drawbacks. It is almost as though they have agreed among themselves that the sensible thing to do is to work round the system. Outside the strictly constitutional division of power there may be an extensive network of machinery for inter-governmental co-operation which makes it possible to overcome or reduce the difficulties inherent in a federal system.<sup>5</sup>

1. *Royal Commission on Constitution*, Vol. I, para 516.

2. *Ibid.*, para 517.

3. *Ibid.*, para 518.

4. *Ibid.*, para 519.

5. *Ibid.*, para 520.

Birch laid emphasis upon the development of "Cooperative federalism" largely as a result of the much wider use of the grant-in-aid led to further movements away from the where definition, which was seen more and more as an expression of the out-dated doctrines of "dual federalism". Furthermore, the study of politics and government is coming more and more under the influence of sociological thought and of those who emphasize the importance of political behaviour rather than of legal structures.<sup>1</sup>

### 27.5. *Indian Federalism—Co-operative Federalism*

Indian federalism can aptly be called a Co-operative Federalism. The Constitution provides for the distribution of Revenue between the Union and the States. There are certain duties which are levied by the Union but are collected and appropriated by the States.<sup>2</sup> Then there are certain taxes which are levied and collected by the Union but have been assigned to the States.<sup>3</sup> Taxes on income other than agricultural income is levied and collected by the Government of India but is distributed between the Union and the States in the manner provided in Article 270 of the Constitution. Art. 272 provides for certain taxes which are levied and collected by the Union and are distributed between the Union and the States.

Over and above the distribution of taxes between the Union and the States the Constitution makes provision for grants from the Union to certain States. Under Article 275 of the Constitution, such sums as Parliament may by law provide shall be charged on the consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States.

### 27.6. *Government of India not strictly Federal.*

India, undoubtedly, is a Union of States and that is what Art. 1 of our Constitution expressly provides. Whether we describe our Constitution as federal or quasi-federal, one cannot ever blind one's vision to the stark reality that India is a Union of States. The Constitution contains a carefully conceived demarcation of power, legislative and executive, between the Central Government on the one hand and the State Governments on the other. The balance of that power ought never to be disturbed, but that is a different thing from saying that inherent or implied limitations should be read into legislative powers or that because India is a Union of States, one must read into the Constitution powers and provisions which are not to be found therein; but which may seem to follow logically from what the Constitution provides for expressly.<sup>4</sup>

Our Constitution has, despite whatever federalism may be found in its structure, so strongly unitary features also in it that, when the totality of these provisions is examined, it becomes difficult to assert confidently how much federalism such a Constitution contains, whether those parts of it which seem to override the federal elements of our Constitution are not more basic or significant than what is described as its federalism.<sup>5</sup>

1. *Federalism, Finance and Social Legislation*, Oxford, 1955 p. 306.

2. *Constitution of India*, Art. 268.

3. *Ibid.*, Art. 269.

4. *Karnataka State v. Union of India*, 1978 SC 68 (139).

5. *Ibid.*, p. 89.

Originally, British India had a unitary Constitution, under which the Provincial Governments had no independent existence except perhaps as agent of the Central Government. Under the Government of India Act, 1935 a federal system was established. Although the part relating to Provincial autonomy was given effect to, the Federation never came into existence.

The Union of India under the Constitution is not based on any agreement among the component States. The Constitution of India can only be said to have been framed by the people of India for the people of India as a whole. The Constitution is a creation of the people of India and not the States; the States themselves being created by the people of India. The Constitution is federal in form but it is not a federation based upon agreement of the component States. The Constitution has allotted certain powers exclusively to the state legislature. Within its own allotted sphere, and subject to the Constitution the State Legislature is supreme.

There is no question of the component States being mere administrative units, acting as agents of the Central Government, as during the British regime. Our Constitution combines the features of the federation as well as of a unitary system. In times of emergency, the federal Government can even be made into a unitary one. But all this flows from the Constitution itself. It is not possible to look beyond it and import extraneous factors to control or guide its implementation.

In *State of West Bengal v. Union of India*,<sup>1</sup> in the majority judgment delivered by B. P. Sinha, C. J. the character and nature of our federal structure has been discussed. The learned Chief Justice observed that in 'our Constitution the Supreme authority of the Courts to interpret the Constitution and to invalidate action violative of the Constitution is to be found in full force'.

"The exercise of powers legislative and executive in the allotted fields is hedged in by numerous restrictions, so that the powers of the States are not co-ordinate with the Union and are not in many respects independent. The political sovereignty is distributed between the Union of India and the States with greater weightage in favour of the Union."<sup>2</sup>

A genuine federation is combination of political units which adhere rather tenaciously to the exclusion of the central authority from strictly demarcated spheres of state action, but there is a Central or Federal 'Government'. The extent of Federalism set up depends upon the extent of demarcation in the executive, legislative and judicial spheres. In a truly Federal Constitution this demarcation is carried out in a very carefully comprehensive and detailed manner. The limits are clearly specified.<sup>3</sup>

### 27.7. Constitutional provisions.

We may now refer to some characteristics and features of our Constitution to demonstrate the weak character of our federal structure and the controlling

1. (1964) 1 SCR 371 : 1963 SC 1241 ; *Karnataka State v. Union of India*, 1978 SC 68 (152).

2. *Ibid.*, p. 1253.

3. *State Karnataka v. Union of India*, 1978 SC 68 (95).

hand of the Centre on States in certain matters. Some of the salient ones are the following :<sup>1</sup>

Article 2 empowers the Parliament by law to admit into the Union, or establish, new states on such terms and conditions as it thinks fit.

Under Art. 3 of the Constitution the Parliament may by law form a new State by separation of territory from state to another or by uniting two or more States or parts of States or by uniting any territory to a part of any State (b) increase the area of any state (c) diminish the area of any state ; alter the boundaries of any state. And all this could be done without the consent of the State concerned. The States are only required to express their view within such period as the President or Central Government may allow.<sup>2</sup>

While a proclamation of Emergency under Article 354 is in operation the Parliament has under Article 250 of the Constitution the power to make laws with respect to any of the matters enumerated in the state list. A part from Emergency Art. 249 of the Constitution gives power to Parliament to legislate with respect to a matter in the State List in the national interest. The only condition is that the Council of States should have passed a resolution supported by not less than two thirds of the members present and voting that it was necessary or expedient in the national interest that Parliament should make laws with respect to any matter mentioned in the State List. What is national interest" is not a defined. This is domination of Parliament over the State Legislation.

Article 257 of the Constitution provides for control of the Union over States in certain cases. Under the provision the executive power of every State shall be so exercised as not to impede prejudice the exercise of the executive power of the Union and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

The executive power of the Union shall also extend the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance.<sup>3</sup>

Article 257(1) imposes a wider obligation upon State to exercise its powers in such a way as not to impede the exercise of executive power of the Union which, as would appear from Art. 73 of the Constitution, read with Art. 248 may cover even a subject on which there is no existing law but on which some legislation by Parliament is possible. It could therefore, be argued that although, the Constitution itself does not lay down specifically when the power of dissolution should be exercised by the Governor on the advice of a Council of Ministers in the State, yet if a direction on that matter was properly given by the Union Government to a State Government, there is a duty to carry it out. The time for the dissolution of a State Assembly is not covered by any specific provision of the Constitution or any law made on the subject. It is possible, however, for the Union Government in exercise of its residuary executive power to consider it a fit subject for the issue of an appropriate direction when it considers that the political situation in the country is such that a fresh election is necessary in the interest of political stability or to establish the confidence of the people in the Government of a State.<sup>4</sup>

1. *Karnataka State v. Union of India*, 1978 SC 68 (152).

2. *Constitution of India*, Art. 3.

3. *Constitution of India*, Art. 257.

4. *State of Rajasthan v. Union of India*, 1977 SC 1361 (1383-84).

Article 365 provides that where any State has failed to comply with or to give effect to any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.<sup>1</sup>

The executive power of the Union shall also extend to the giving of directions to a state as to the measures to be taken for the protection of the railways within the State.<sup>2</sup>

The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.<sup>3</sup>

These provisions clearly point out and indicate that India is a Unitary State.

However, we may examine the express provisions of our Constitution relating to the organs of Government in the States which, no doubt, give the appearance of full-fledged separate States for certain purposes. Each State has its own Governor exercising the executive power of that State. But, all Governors, although undertaking to devote themselves to the service and well-being of the people of the respective States, owe an undivided allegiance to "the Constitution and the law". Each of them is appointed by the President and holds office during the pleasure of the President to whom he sends his reports with a view to any proposed action under Article 356 of the Constitution. The Governor's authority, under the warrant of his appointment, is traceable to the President to whom he is to submit his resignation if he resigns.<sup>4</sup>

The Governor of a State is appointed by the President and holds office at his pleasure. Only in some matters he has got a discretionary power but in all others the State administration is carried on by him or in his name by or with the aid and advice of the Ministers. Every action, even of an individual Minister, is the action of the whole Council and is governed by the theory of joint and collective responsibility. But the Governor is there, as the head of the State, the executive and the Legislature, to report to the Centre about the administration of the State.<sup>5</sup>

Making a departure from the corresponding provision in the Government of India Act, Entry 45 in List III of the Seventh Schedule empowers the Parliament to legislate on the subject of "inquiries for the purpose of any of the matter specified in List II also besides List III, and List I as mentioned in Entry 94 of that List. The constituent power of amendment of the Constitution lies with the Parliament under Articles 368 providing for concurrence by half the number of the States in certain matters.<sup>6</sup>

Parliament is also empowered by Article 3 to make law for the formation of new States and alteration of areas, boundaries and names of existing States. Such is the nature of our federal structure.

1. *Constitution of India*, Art. 257.

2. *Constitution of India*, Art. 257 (3)

3. *Constitution of India*, Art. 256.

4. *Karnataka State v. Union of India*, 1978 SC 68 (96).

5. *Ibid.* p. 152.

6. *Ibid.* p. 152.

### 27.8. Federation and Unitary system.

The essence of the distinction—what constitutes a federal as distinct from unitary state—lies in the fact that the unitary state has but one omniscient legislature, whether or not, like South Africa, it has subordinate provinces with defined powers. In the unitary state there can be no field of legislation which the central Parliament cannot enter. In the federal state, on the other hand, power are divided between the central or local governments so that each of them is independent of the other. Each government has a separate and co-ordinate power. If the central government can invade the provincial field at will, or the provinces can control the central government, there is no federation.<sup>1</sup>

It is not justified, as Professor H. F. Angus seems to think, because the preamble of the Act states that the three federating provinces, have 'expressed their desire to be federally united.' It is not what comes in the preamble, but in the provisions of the statute itself, which counts. The whole Act must be examined to see what it provides, each clause being read in the light of all other clauses, and only then can the entire scheme be classified according to the accepted theory of federalism. We should not say 'A federal state requires such and such relationships between the governments, therefore we will find them in the Canadian constitution.' We should say 'This is what the Canadian constitution provides; what kind of federalism is it?'.<sup>2</sup>

Professor K. C. Wheare, in his *Federal Government*,<sup>3</sup> has this to say after examining the text of the BNA Act: 'The federal principle is not completely ousted, therefore, from the Canadian constitution. It does find a place there and an important place. Yet if we confine ourselves to the strict law of the constitution, it is hard to know whether we should call it a federal constitution with considerable unitary modifications, or a unitary constitution with considerable federal modifications. It would be straining the federal principles too far. I think to describe it as a federal constitution without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal constitution.' Professor Wheare goes on to point out the distinction between a federal constitution and a federal government, and has no hesitation in concluding that in the practice of government, in the adoption of conventions and forms of behaviour Canada acts as a federal state. A country may behave as though it is federal when in strict law it is not. But these conventions and this behaviour have grown up since 1867, and here we are discussing the nature of the original constitution to which alone the compact, if there was one, can refer.'<sup>4</sup>

The second example consists of the federal power of appointment of Lieutenant-governors. It is now settled since the *Liquidator's* case,<sup>5</sup> that the Lieutenant-governor, though appointed by Ottawa, represents the Crown as fully for purposes of provincial government as the governor-general does for all purposes of national government. Nevertheless, the fact that he is chosen, paid, removed, and instructed by federal authority gives a power of interference in provincial affairs not consistent with the idea of provincial autonomy. The federal power of instruction is particularly important; in assenting to bills, withholding assent, and reserving bills for the signification of the Governor-General's pleasure, he (the lieutenant-governor) exercises his discretion subject

1. Scott : *Essays on the Constitution*, p. 177.

2. *Ibid.*, p. 177.

3. *Federal Government*, Toronto, 1946, p. 20.

4. Scott : *Essays on the Constitution*, p. 178.

5. *In re Disallowance and Reservation*, 1938 SCR p. 79.

to the instructions of the Governor-General. Since confederation there have been 104 cases of disallowance of provincial bills, 64 cases of reservation by lieutenant Governor and 25 cases of out-right refusal of assent.<sup>1</sup> so that it cannot be said that convention has rendered obsolete these forms of control. The governor-general is now by convention free from imperial executive interference; not so the lieutenant-governor from federal executive interference. The latter was intended to be, and still is, an agency through which in certain instances the will of the federal executive can make itself felt in provincial affairs. It is for this reason that the provinces may amend their constitutions as they will, 'except as regard the office of Lieutenant Governor.'<sup>2</sup>

As his third example of the unitary principle, Professor Wheare cites the rule that appointments to all the important judicial posts in the provinces are in the hands of the Dominion executive. Here again there is a departure from the strictly federal idea. Though the provinces may create courts of justice and staff the inferior ones, the higher posts are filled with judges selected, paid pensioned and removed by federal authority. Appeals go from the provincial court of appeal to the national Supreme Court. There is not in Canada an independent provincial judiciary such as exists in the states of the American Union.<sup>3</sup>

## SEPARATION OF POWER

### SYNOPSIS

27.9. Separation of power—Doctrine of.

27.10. No Separation of power under the Constitution.

27.9. *Separation of power - Doctrine of.*

No doctrine of separation of powers is contained in Aristotle's famous distinction between the deliberation, magistracy and judicial activity.<sup>4</sup> He was concerned with the distinction between the various activities of the State organs, but not with an apportionment of their functions, nor was he opposed to an assembly which legislated, administered and administered justice.<sup>5</sup> Locke did not have any doctrine of separation of powers, Montesquieu differed radically from Locke.

According to Montesquieu, in every government there are three, and only three, functions of government, the "legislative" the "executive", and the "judicial" and these three functions should be exercised by distinct bodies of men in order to prevent an undue concentration of power. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a

1. See E. A. Forsey : *Disallowance of Provincial Acts* (Canadian Journal of Economics and Political Science, Vol. IV no. Feb. 1938, p. 47).

2. B. N. A. Act, Section 92, 551; Scott : *Essays on the Constitution*, p. 179.

3. Scott : *Essays on the Constitution*, p. 179.

4. Aristotle—*Politics*, IV 14, 1298.

5. Franz Neumann : *Introduction to Montesquieu ; The Spirit of the Laws*, p. IV Fn. 62.

tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Where it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals".

The doctrine of separation of powers in its developed form is due to Montesquieu<sup>1</sup> who attributed that object and those principles to England. In the eighteenth century the division of the powers of government was considered to be such an essential characteristic of the English Constitution that it was made the basis for the doctrine of separation of powers. His theory was not so obviously inconsistent with the English constitution of his time as it has since become, for the concentration of legislative and executive power in the hands of the Cabinet is due to conventional rules, which had not been fully developed in his time.<sup>2</sup>

This doctrine, which is to the effect that in a nation which has political liberty as the direct object of its constitution no one person or body of persons ought to be allowed to control the legislative, executive and judicial powers, or any two of them, has never in its strict form corresponded with the facts of English Government mainly because, although the functions and powers of Government are largely separated, the membership of the separate instruments of state overlap. Only in one aspect of the constitution can it be said that the doctrine is strictly adhered to, namely that by tradition, convention and law the judiciary is insulated from political matters.<sup>3</sup>

The doctrine of separation of powers had a very great influence every where and was applied extensively in the framing of the constitution of the United States.

The different ways in which Montesquieu's principle of separation of powers may be interpreted and applied in practice is shown by the subsequent history of three great democracies of Great Britain, the United States, and France. Thus in Britain the separation of powers was maintained and yet enabled Parliament to be supreme and the Courts, subject to Parliament, to give remedies against administrative authorities. In the United States the same doctrine was maintained and therefore separated the executive from the legislative and yet enabled the Supreme Court to declare invalid Acts of the Legislature. In France the Legislature has become supreme but has not enabled the Civil Courts to control the legality either of legislative or of administrative acts.<sup>4</sup>

Madison in the Federalist No. 47, reviewing the origin of the separation of powers doctrine, remarked that Montesquieu, the 'oracle' always consulted on the subject, 'did not mean that these departments ought to have no *partial* agency in, or no control over the acts of each other.'<sup>5</sup> His meaning, as his own words import . . . can amount to no more than this, that where the *whole*

1. *Esprit des Lois*, Book XI, Chs. V, VI.

2. Halsbury—*Laws of England*, Vol. 8 para 813 F.N 2.

3. Halsbury : *Laws of England*, Vol. 8, 4th Edn. para 813.

4. Jennings : *Law and the Constitution*, p. 28 3rd ed.

5. *Nixon, Richards v. Administrator General*, 53 L ed 2d 869 (890).



power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.<sup>1</sup>

Similarly, Mr. Justice Story wrote : "When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree".<sup>2</sup>

The Presidential Recording and Materials Preservation Act provided in general that the Administrator of General Services shall take custody of former President Nixon's papers and tape recordings. Nixon challenged the Act's constitutionality on the ground that it violated the Constitutional principles of separation of powers and the Presidential privilege of confidentiality. In his dissent Burger, C. J said :

"The well established principles of separation of powers, as developed in the decisions of this Court, are violated if Congress compels or coerces the President, in matters relating to the operation and conduct of his office. Next, the Act is an exercise of executive not legislative power by the Legislative Branch". Separation of powers is in no sense a formalism. It is the characteristic that distinguishes our system from all others conceived upto the time of our Constitution. With federalism separation of powers is "one of the two great structural principles of the American Constitutional system".<sup>3</sup>

So broad a principle as the doctrine of the separation of powers has naturally received at times conflicting interpretation by the Supreme Court, occasionally from the same Judges. The most recent pronouncement of the U. S. Supreme Court<sup>4</sup> on the subject recalled its decision in *United States v. Nixon*<sup>5</sup> saying : 'Although acknowledging that each branch of the government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due great respect from the other branches, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. The Court went on : "Like the District Court, we therefore find that appellant's argument rests upon an archaic view of the separation of powers as requiring three airtight departments of government. Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress'.

The Court rejected at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials with the Executive Branch constituted, without more, a violation of the principle of separation of powers.<sup>6</sup>

1. The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) emphasis in original ; *Nixon, Richards v. Administrator General*, 53 L ed 2d 867 (890).

2. J. Story : *Commentaries on the Constitution* 525 (M. Bigelow, 5th ed. 1905).

3. *Nixon, Richards v. Administrator General*, 53 L ed 2d 867 (930-31).

4. *Ibid.*, p. 891.

5. 418 US 683 : 41 L ed 2d 1039.

6. *Nixon, Richards v. Administrator General*, 53 L ed 2d 867 (890).

'Our system of government is after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "(i) it is emphatically the province and duty of the judicial department to say what the law is",<sup>1</sup> it is equally and emphatically the exclusive province of the Congress legislature not only to formulate Legislative policies and mandate projects, but also to establish their relative priority for the Nation. Once Parliament, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.<sup>2</sup>

It is believed to be one of the chief merits of the American system of constitutional law that all the powers entrusted to government whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these departments of government shall be vested in a separate body of public servants and that the perfection of the system requires, that the lines which separate and divide, these departments shall be broadly and clearly defined.<sup>3</sup>

#### 27.10. No separation of power under the Constitution.

The Indian Constitution has not recognised the doctrine of separation of powers in its absolute rigidity, but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.<sup>4</sup>

The Indian Constitution has established a three fold separation of institutions and organs, legislature, executive and judicial, yet relates the three in a complicated fashion in which each of the three branches has functions that in logic of strict separation would belong to the other two.<sup>5</sup>

The limits within which the executive Government can function under Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.<sup>6</sup>

The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.<sup>7</sup>

Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is

1. *Marbury v. Madison*, 2 L ed 60.

2. *Nixon, Richards v. Administrator General*, 53 L ed 2d 867.

3. 53 L ed 2d 867 : *Kilburn v. Thomson* US 168 : 26 L ed 377 (387).

4. *Ram Jawalya v. State of Punjab*, 1955 SC 549 (556).

5. *Delhi Municipality v. Birla Cotton and Spl. and Wvg. Mills*, 1968 SC 1232 (1251).

6. *Ibid*, p. 536.

7. *Ibid*, p. 556.

that "the concentration of powers in any one organ may to quote the words Chandrachud, J. in *Indra Gandhi*<sup>1</sup> case "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged" Take for example, a case where the executive which is in charge of administration of acts to the prejudice of a citizen, and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution of the Constitution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution.

In Parliamentary form of government modelled on British model, the executive, legislative and judicial powers are in the main entrusted to separate instruments of the State. It is not for a moment suggested that there is strict or water tight division of powers, but the functions are certainly divided.<sup>2</sup>

In England the powers of Government are divided. The Executive, Legislative and Judicial powers are in the main entrusted to separate instruments of the state. Thus the original concentration of power in the Sovereign no longer exists ; in the Eighteenth Century this division of the powers of government seemed to be such an essential characteristic of the English Constitution that it was made the basis for the doctrine of separation of powers. This doctrine which is to the effect that in a nation which has political liberty as a direct object of the constitution no one person or body of persons ought to be allowed to control the legislative, executive, and judicial powers, or any of two of them, has never in its strict form corresponded with the facts of the English Government, mainly because although the functions and powers of government are largely separate the membership of the separate instruments of the state overlap only in one aspect of the constitution can it be said that the doctrine is strictly adhered to namely by tradition, convention and law the judiciary is insulated from political matters.<sup>3</sup>

There thus is a broad division of functions such as executive, legislative and judicial in our Constitution. The Legislature lays down the broad policy and has the power of purse. The executive executes the policy and spends from the Consolidated Fund of the Union and the State what the Legislature has sanctioned.<sup>4</sup>

1. *Indra Gandhi v. Raj Narain*, 1975 SC 2299.

2. *Nayak, RS v. Antulay, A. R.*, (1984) 2 SCC 183 (231).

3. *Malsbury: Laws of England*, 4th. ed. Vol. 8, para, 813.

4. *Nayak RS v. Antulay, A. R.*, (1984) 2 SCC 183 (233).

## State and People

### SYNOPSIS

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#### 28.1. *State and People.*

Though the terms 'people', 'nation', 'State', and 'government' are often used interchangeably, they connote quite different conceptions. The most concise and at the same time, clearest statement of the distinctions between these several ideas and terms is contained in the introductory chapter of the 'American Constitutional system' by W. W. Willoughby.

#### 28.2. *Society and State—Meaning of.*

"An aggregate of men living together in a single community and united by mutual interests and relationship we term a society. When there is created a supreme authority to which all the individuals of the society yield a general

abedience, a State is said to exist. The social body becomes in other words a Body Politic. The instrumentalities through which this superior authority formulates its will and secures enforcements is termed a Government, the commands it issues are designated laws. The persons that administer them, public officials, or collectively a Magistracy; the whole body of individuals viewed as a political unit, is called a People and finally the aggregate of rules and maxims, whether written or unwritten, that define the scope and fix the manner of exercise of the powers of the State is known as the Constitution. The State in itself is neither the people, the Government, the Magistracy, nor the Constitution. Nor is it indeed the territory over which its authority extends. It is the given community of given individuals served in a certain aspect, namely as a political unity.<sup>1</sup>

The State is the body politic. The Government is merely the aggregate of the instrumentalities employed by such body in performing its functions.<sup>2</sup>

An important characteristic of the 'State' is that it possess an unity which is indivisible and immutable. The very conception of State implies unity and indivisibility. It is like the the individuality of a person. It is complete in itself; it cannot be shared with any other body. It is incapable of being either divided or of undergoing change. It is in respect to this characteristic that it is so important to distinguish between State and Government. A state can change its Government as often as it desires, as an individual changes his clothes, without itself undergoing any change. It can make use of one system of authorities for the administration of its affair, as is done when the system of Government adopted the type known as unitary, or it can make use of two schemes as is done where what is known as a multiple or federal form of Government is established without affecting the character of the State.

There is thus a State of the United States, notwithstanding its federal form of Government, that is as definitely an unit as the State of France or any other State having a unitary Government. The fact that the people of the former have preferred to bring into existence two schemes of Government for the conduct of their political affairs, whilst those of the latter have preferred to make use of but a single system, represents merely a difference of choice in respect to means to be employed, not different in kind from all other differences in Governmental detail, no matter how apparently insignificant.

### 28.3. Concept of State—Changes.

The concept of "state" has undergone drastic changes in recent years. Today state cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation. "If we clearly grasp the character of the State as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service".<sup>3</sup>

"It may seem curious" as MacIver said "that so great and obvious a fact as the state should be the object of quite conflicting definitions, yet such is certainly the case. Some writers define the "state" as essentially a class structure 'an organisation of one class dominating over other classes' others regard it as the one organization that transcends class and stands for the whole community. Some interpret it as a power system, others as welfare system;

1. W. W. Willoughby : *American Constitution System*, p. 364.

2. W. F. Willoughby : *The Government of Modern States*, p. 5.

3. MacIver : *The Modern State*, p. 183.

some view it entirely as a legal construction, either in the old Austinian sense which made it a relationship of governors and governed, or in the language of modern jurisprudence as a community 'organised for action under legal rules'. Some class the state as one in the order of 'corporations' and others think of it as indistinguishable from society itself."<sup>1</sup>

A State, according to Vinogradoff,<sup>2</sup> is a juridically organised nation or a nation organised for action under legal rules. Expanding the definition, one may say that "a modern state is generally a territorial nation, organised as a legal association by its own action in creating a constitution, and permanently acting as such an association, under the Constitution, for the purpose of maintaining a scheme of legal rules defining and securing the rights and duties of its members."<sup>3</sup>

A national society or community is not abolished by, or exhausted in, the emergence of the State. The State is a national society or community organised as a legal association under a 'deed' called a constitution; but the national society or community continues to exist and act apart from the 'deed' and as something distinct from the legal association. It exists and acts for a number of purposes (economic, religious, educational and the like), and through a number of contained unions, societies, and associations, which collectively and in their aggregate constitute national society or community as a whole. Though State and Society are distinct, they are also connected and interdependent; State and Society play different parts in a system of co-operation. The state being the sole vehicle of law and legal regulation; but society continuing to act for a variety of purposes by the side of the State, in connection with the State, and on a system of interdependence between the State, and itself.<sup>4</sup>

"By society" says Barker "we mean the whole sum of voluntary bodies, or associations contained in the nation with all their various purposes and all their institutions. Taken together, and regarded as a whole, these associations form the social substance which goes by the general and comprehensive name of "society". By word 'State' we mean a particular and special association, existing for the special purpose of maintaining a compulsory scheme of legal order, and acting therefore through laws enforced by prescribed and definite sanctions. It differs (and differs profoundly) from the associations other than itself which we call, in their sum, by the name of 'society'. It differs in two respects: First, it includes *all* the members of the stock which inhabits its space or territory, and it includes them all as a matter of necessity; other associations include only *some* and they include these on a voluntary basis. Secondly, the State has the power of using legal coercion, the power of enforcing obedience, under the sanction of punishment, to ordained rules of behaviour; other associations, in virtue of their voluntary basis, can apply only social discipline, and can expect only voluntary obedience to agreed ways of behaviours, obedience enforced in the last resort by the sanction of exclusion from membership. We may therefore say of the State that while it is an association like other associations, in the sense of being a union of men for the purpose of acting as social partners in the realization of a common purpose, it is also an association which is unlike other associations, in the sense of having a unique purpose (the purpose of maintaining a compulsory scheme

1. Mac Iver: *The Modern State* p. 3-4.

2. Vinogradoff: *Historical Jurisprudence*, Vol. 1, p. 85.

3. Barker: *Reflections on Government*, p. XV.

4. Barker: *Reflections on Government*, p. XVI.

of legal order) which gives it the unique *scope* of including compusorily all the persons resident in a given territory and the unique power of making law and using legal coercion.<sup>1</sup>

A State is community of men being under a scheme of law which is backed, in the last resort, by the application of force.<sup>2</sup>

Laski defined a state as a society which is intergrated by possessing a coercive authority legally supreme over any individual or group which is part of the society. An examination of any national society will always reveal within its boundaries not only individulas, but also associations of men grouped together to promote all kinds of objects, religious, economic, cultural, political, in which they are interested. This power is called sovereignty; and it is by the possession of sovereignty that the state is distinguished from all other forms of human association.<sup>3</sup>

"A definition of the 'State' is made very difficult" says Kelson "by the variety of objects which the term commonly denotes". According to him the State is the community created by a national legal order. The State as juristic person is a personification of this community or the national legal order constituting this community. From a juristic point of view, the problem of the State therefore appears as the problem of the national legal order.<sup>4</sup>

"The word 'State' when it came into use in England during the sixteenth century" says Barker brought with it from Italy the idea of a high "State or stateliness vested in some one person or some one body of persons". Bacon, in the beginning of the seventeenth century, uses "state" as a term synonymous with or parallel to King, as when he speaks of Kings and States", consulting Judges, Louis XIV, in the middle of the seventeenth century, must have thought that he was stating a truism and not attempting a paradox when he exclaimed. L' Etat cest moi was he in his own view, as in that of his subjects, the person who enjoyed the "State" and position of being the supreme political authority and was he not therefore "the State"<sup>5</sup>. To quote Barker again "But this connotation began to disappear or rather to be overlaid when a graded and hierarchical society yields to a society of equals. After the end of the eighteenth century it may be said L' Etat, c'est nous The State is now the whole commuity; the whole legal association; the whole of the juridical organization. This is democracy, or a result of democracy. We must henceforth think of the state as ourselves (or as the juridical organization which we have given to ourselves or the legal association into which we have formed ourselves) and we must henceforth give the name of 'Government' to the authority before called "state" which is now seen as exercising on our behalf the powers which it had hitherto claimed as its own. But language is slow in adopting itself to changes of thought; and words may long continue to carry the association of a vanished past. We still use the term "State" with the connotation—only overlaid. and not yet erased—of earlier centuries. We regard the state still as some sort of being, some how distinct from outselves, which still interferes with us (thus we speak of state interference.).<sup>6</sup>

In the days when the sovereign was an actively ruling monarch the entire power and prestige of the state was concentrated in his person. The aura of

1. Barker : *Principle of Social and Political Theory*, 3, 4.

2. Barker : *Foundations of Politics in Memorial Lectures*, 1935.

3. Laski : *The State in Theory and Practice*, p. 21.

4. Kelson : *General Theory of Law and State*, p. 181-82.

5. Barker : *Principles of Social and Political Theory*, p. 90-91.

6. *Ibid.*, p. 91.

kingship created a vast distance between him and his subjects and lent special dignity to the civil and military servants who executed his will. Under democratic conditions this view of the state as a thing apart is not easy to maintain. Though allegiance to a democracy may be symbolised by flags, anthems and uniforms and even by a royal family the authority to which these symbols point is no longer that of a prince over his subjects but that of a sovereign people, collectively, over its own individual members under these circumstances the state is hard to distinguish from the citizens in whose name and over whom its authority is being exercised. Attention shifts from the state to the Government, which does all the actual ruling.<sup>1</sup>

#### 28.4. State—Meaning in the Constitution.

The Constitution has used the word State in different senses :

Article 1, India, that is Bharat shall be the Union of States. "India" is a sovereign state recognised in International Law. It is a body politic. It is Union of States. Here the words States are not States in the sense which "India" is. There mean a community of people living in a certain territories delineated in schedule, having a government whose functions are defined in the constitution. These are really political being given a dignified name State. In Articles 2 and 3 the word State means a geographical units having a territory. In Article 4 State means a political division.

It was said by Fazal Ali J. that the word "State" means "State" along with its territory or institutions."<sup>2</sup>

The constitution envisages a federal structure of government. The entire Indian community lives in the territory of India. Part of the Indian community lives in different territories which are described as the territories of different states and in the territory known as union territories. This part of the community living in different territories is considered in the constitution as a "state" having a separate legislative and executive government of that state. It is in this sense that the word "State" is used in Articles 83, 84, 85, 66, 67. In Article 73 (1) proviso the word state means geographical territory and in Art. 73 (2) the word means the government of the political division called state.

In Articles 80, 81 the word "state" means the community living in political division called states. In Part VI and XI of the constitution the word state means the community living in a defined territory called "the State". This part deals with powers and functions of the organs of the government.

Under Art. 131 the Supreme Court exercises original jurisdiction to decide disputes between the "Government of India" and the "State" and in *State of Rajasthan v. Union of India*<sup>3</sup> the question was whether the state meant "government of the state."

Beg, CJ. did not decide whether there was a distinction between a State and its government and rights and those of its government or its members. Chandrachud, J. said that the dispute between the government of India and a State cannot but be a dispute which arises out the differences between the government in office at the Centre and the Government in office in the State.<sup>4</sup>

1. *International Encyclopedia of Social Sciences*, Vol. 15, p. 153.

2. *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 (682); 1977 SC 1361.

3. *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 (692); 1977 SC 1361.

4. (1977) 3 SCC 592 (682); 1977 SC 1361.



Fazal Ali, J. took the view that the word "State" in Article 131 meant a constituent unit of the Union along with its territory and permanent institutions. Government would be included in the expression "permanent institutions." Distinction between government and the state was completely overlooked.<sup>1</sup>

The word "State" has not been defined in the Constitution.

In the General Clauses Act, 1877 the words "State" and "State Government" have been defined.

"State"<sup>2</sup> (a) As respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean Part A State, a Part B State or a Part C State; and

(b) as respects any period after such commencement shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory.

"State Government"<sup>3</sup> (a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province in a Part B State, the authority or person authorised at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government :

(b) as respects anything done (after the commencement of the constitution (Seventh Amendment) Act, 1956) shall mean, in a Part A State, the Governor, in Part B State, the Rajpramukh, and in a Part C State, the Central Government;

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in Union territory, the Central Government ; and shall in relation to functions entrusted under Article 258-A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that Article .

It appears that the Constitution does not make any real distinction between a State and the government of the State which would include all the organs of the government.

In Article 12 of the Constitution a very wide and comprehensive definition of the State has been given. The same definition of the word State applies to Part IV of the Constitution which deals with the Directive Principles.

Article 12 defines State as follows : 'In this Part, (III dealing with fundamental rights) unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.'

### 28.5. Sovereignty.

In 16th Century France, Bodin used the new concept of Sovereignty to bolster the power of the French King over the rebellious feudal lords ; the transition from feudalism to nationalism was thus facilitated. The theories of

1. *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 (638).

2. *General Clauses Act*, 1897, Section 3.

3. *Ibid.*, Section 3.

John Locke at the end of the 17th Century and of Jean Jacques Rousseau in the 18th Century, that the State is based upon a compact of its citizens, through which they entrust such powers to a government may be necessary for common protection, led to the development of the doctrine of popular sovereignty that found expression in the American Declaration of Independence in 1776. Another twist was given, to this concept by the statement in the French Constitution of 1791 that "Sovereignty is one, indivisible, unalienable and imprescriptible; it belongs to the Nation; no group, can attribute sovereignty to itself nor can an individual arrogate it to himself." The idea of popular Sovereignty exercised primarily by the people became thus combined with the idea of national sovereignty exercised not by an unorganised people in the state of nature, but by a nation embodied in an organised state. Going one step further and investigating who in the name of the people or of the state exercises sovereignty, John Austin came to the conclusion that sovereignty was vested in a nation's Parliament. This was the Supreme organ that enacted laws binding upon every body else but that was not bound by the laws and could change those laws at will. This particular description again fitted only a particular system of Government such as prevailed in Great Britain in the 19th Century. When this idea of legislative sovereignty crossed the Atlantic ocean, it did not really fit the American situation. The Constitution of the United States, being the fundamental law of a federal union did not endow the national Legislature with supreme power, but imposed important restrictions upon it. A further complication was added when the Supreme Court of the United States asserted successfully its right to declare laws, unconstitutional. While this development did not lead to a concept of judicial sovereignty, it seemed to vest the sovereign power in the fundamental document itself, the constitution.<sup>1</sup>

The Supreme Court of India and the High Courts have the powers of judicial review and can declare the legislative and executive acts ultravires, if they are not authorised by the Constitution. The Constitution is thus Supreme.

The erosion of the concept of sovereignty is specially clear in the case of constitutional democracy. When the powers of government are limited by the provisions of a constitution whether written or unwritten, it is hard to say, who if any are in a position to exercise sovereignty. Although the government is supposed to reflect the will of the sovereign people actual decisions are the outcome of a complex political process in which many different agencies are allowed to play a part. Since the rights and duties of these various agencies are defined by the Constitution, it is some times said that in constitutional democracies, the constitution itself is sovereign. But a Constitution is not a person with a mind and will of its own, it is a collection of laws, that have to be defined and enforced by some one. Although the powers of a constitutional democracy are in a very real sense derived from the consent of their governed, the process of electing that consent is highly complex. To say where sovereignty lies in such a system is almost impossible.

## 28.6. State and Government.

All institutions must act through persons, The power they exercise can not operate in any other fashion. The state, therefore, needs a body of men who operate in its name, the Supreme Coercive authority of which it disposes and this body of men is what we term the government of the state.<sup>2</sup>

1. *Encyclopedia Britanica*, 1965 Vol. 21 p. 99.

2. Laski : *The State in Theory and Practice*, p. 23.

It is one of the fundamental axioms of political science that we must distinguish shortly between state and government. The latter is but the agent of the former ; it exists to carry out the purposes of the state. It is not itself the supreme coercive power ; it is simply the machinery of administration which gives effect to the purposes of that power. It is not sovereign in which sense the state is sovereign, its competence is defined by such authority as the state may choose to confer upon it, if it over steps that authority, it may, where such provision exists, be called to account. The idea of government responsible for the commission of acts beyond its allotted powers is the central idea of every state where legal rule has replaced arbitrary dissolution as the basis of political action.<sup>1</sup>

Even a ruler so powerful as the President of the United States must find authority for the exercise of his will either in the constitution or in some power legally granted to him thereunder by the Congress of his country. There are even countries, of which the United States is itself an example, in which the state expressly forbids its government, by the Constitution under which that government must act, to take certain types of power or to exercise others in certain ways.<sup>2</sup>

The purpose, it is said, of the distinction between state and government is to emphasise the limitation upon the latter as to act that it pays proper regard to the end for which the state may attain the maximum satisfaction of their desires. The expedients of limitation, the a written constitution, a bill of rights, the separation of powers, and so forth-are all methods which experience has suggested to prevent abuse of the state's sovereign power by the government which acts in its name. For every government is composed of fallible men. They may deliberately exploit the authority they possess for their own selfish purposes. They may, with the best intentions, but quite unreasonably, mistake the private interest of a few for a well-being of the whole community. They may be ignorant of the position they confront, or incompetent in handling it. Circumstances such as these have occurred in every political society at some period of its history. The value of the distinction between state and government is the possibility it offers of creating institutional mechanisms for changing the agents of the state, that is, the government, when the latter shows itself inadequate to its responsibilities.<sup>3</sup>

It is necessary to observe that in the endless processes of political change any form of government, as it exists at a particular moment, is likely to exhibit features characteristic of different types, while it is moving in one direction or another.<sup>4</sup>

There is a distinction between the government of a state and the State itself. In common speech and common apprehension they are usually regarded as identical, and as ordinarily, the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of State is generally compounded with the State itself and often the former is meant when the latter is mentioned. The State itself is an ideal person intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative ; but outside of that it is a lawless usurpation. The Constitution of the State is the limit of the authority of its

1. Laski : *The State in Theory and Practice*, p. 23.

2. *Ibid.*, p. 24.

3. *Ibid.*, p. 24-25.

4. Mc Iver : *Web of Government*, p. 150.

government and both government and State is subject to the supremacy of the Constitution of the laws made in pursuance thereof.<sup>1</sup>

### 28.7. Classification of Governments.

According to Mac Iver, governments may be classified thus :—

(1) *Monarchy*. The monarch is literally the "sole ruler", and the word suggests exclusive or absolute power.

(2) *Dictatorship*. The dictator, however absolute his power may seem, is the chief of a ruling clique, the head man of the "party". The transcendent authority ascribed to the Leader, Fuhrer or Duce, is a propagandist device for the corroboration of the dictatorial myth, corresponding to the majesty or divinity attributed to the hereditary monarch.

(3) *Theocracy*. On the formal side theocracy differs from dictatorship and from monarchy in that its head is not hereditary, as in a monarchy, or initially set up by a coup d'état; as in dictatorship. The theocratic ruler is usually the choice of the priestly college or caste. He is presumed to be in some sense divinely ordained, the vice-gerent of God. Theocracy can exist also as an over-all authority under which the sovereignty of the temporal ruler is limited by its subordination to the final direction of the theocratic head.

(4) *Limited Monarchy*. The mere limitation of monarchy does not make democracy. Monarchies are nearly always limited by some constitutional conditions. The limits set on the power of the monarch may, however, be in the interest of the ruling class of dominant group. Only when the monarchy is so limited that the monarch does not directly intervene in political decisions, and these decisions are made by the elected representatives of the whole people, do we arrive at democracy. Then the king "reigns" but does not rule, as in modern England, where he serves as a symbol of unity and as a kind of honorary president who is outside the political arena. This kind of democracy differs, however, from the republican kind in that the monarch, as the "fountain of honor", the bestower of titles, the focus of a court, and the apex of a prestige structure, presupposes the operation of a class-system that is formally negated by the republic.

(5) *Republic*. The historical antithesis of republic is monarchy, and the term "republic" has been rather freely applied to almost any kind of state that has no monarchical headship and has, with whatever limitations, some system of election to political offices. Thus we speak of the Roman Republic, referring to the time after Ancient Rome banished her kings while remaining strongly oligarchical, or the Soviet Republics, or the republics of Latin America, although they are in effect dictatorships and poles apart from such democratic republics as Switzerland, France, and the United States of America. The term is more strictly applicable to democratic states. The titular head of a republic, the president, is elected, not hereditary. In one type of republic this head has mainly ceremonial functions, above the conflict of parties, analogous to those of a constitutional monarch. The President of France was an example. In another type, represented by the United States, the president has the arduous task of combining the ceremonial offices of the head of the state with the political activities of the head of the executive. He is president and prime minister in one. In the United States the president is not appointed by the legislature but by a mode of popular election. He has thus, as chief executive,

1. *Poindexter v. Greenhow*, 29 L ed 185 (1902).

an independence from the legislature, or a sort of separation from it, that stands in contrast to the cabinet system of other democracies, whether republican or not, such as France and England. The democracies of Europe and of the British Commonwealth of Nations have generally adopted some kind of cabinet system; the countries of Latin America have followed, at least formally, the "presidential system" characteristic of the United States.

(6) *Capitalist Government*. "Capitalist" is used here as antithesis to "socialist". It does not mean government on behalf of a capitalistic class—an attribution that may or may not be justified according to the conditions. It does mean a government the activities of which are in part determined and in part limited by the substantial presence of private economic enterprise. The distinction between capitalistic government and socialist government is a matter of degree. A government is here named socialist not because the party in power is socialistically minded—it will still be capitalist if it meets the above-mentioned condition—but because the control of government over the economic life goes so far as to involve the public ownership and direction of the main instruments and agencies of production. Practically all modern capitalist governments are socio-capitalist, in the sense that private economic enterprise is to a considerable but greatly varying extent supervised and limited by them.

(7) *Socialist Government*. This form of government, as above defined, may also be more or less inclusive. While exercising ownership over the means of production it may admit the private incentive of a graduated wage- and-salary scale and leave the distribution of economic goods to be determined by consumer demands and the variations of consumer incomes. It may also allow private trading enterprise on a larger or smaller scale. The most inclusive range of socialist government would fully organize distribution as well as production, apportioning goods on the basis of needs rather than of economically evaluated services. Socialism then becomes communism, in the proper sense of that word. Communism, so understood, has been tried only in small relatively isolated communities.

Since the advent of the Constitution, the State action must be directed towards attaining the goals set out in Part IV of the Constitution which, when achieved, would permit us to claim that we have set up a welfare State. Article 38 (1) enjoins the State to strive to promote welfare of the people by securing and protecting as effective as it may a social order in which justice social, economic and political shall inform all institutions of the national life. In particular the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. Article 39 (d) enjoins a duty to see that there is equal pay for equal work for both men and women and this directive should be understood and interpreted in the light of the judgment of the Supreme Court in *Randhir Singh v. Union of India*.<sup>1</sup>

Where all relevant considerations are the same, persons holding identical posts may be treated differently in the matter of their pay merely because they belong to different departments. If that cannot be done when they are in service, can that be done during their retirement? Expanding this principle one can confidently say that if pensioners form a class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later. Article 39 (e) requires

1. (1982) 1 SCC 618 : 1982 SC 879.

the State to secure that the health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 41 obligates the State within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to provide assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want. Article 43(3) requires the State to endeavour to secure amongst other things full enjoyment of leisure and social and cultural opportunities.

The path to be pursued by the State is to set up a Sovereign, Socialist, Secular, Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the Objects and Reasons for amendment amongst other things, ushering in of socio-economic revolution was promised. The clarion call may be extracted :

"The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity has been engaging the active attention of Government and the public for some time.....

It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism... ..to make the directive principle more comprehensive... .."

What does a Socialist Republic imply ? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principle aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism, leaning heavily towards Gandhian socialism. During the formative years' socialism aims at providing all opportunities for pursuing the educational activity.

After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without let or hindrance of caste, colour, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise. But even here the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a mahatma, a worker or a pariah. The old age overtakes each one, death being the fulfilment of life providing freedom from bondage. But here socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. In the fall of life the State shall ensure to the citizens a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable leisure, relieving the boredom and the humility of dependence in old age. This is what Article 41 aims when it enjoins the State to secure public assistance in old age, sickness and disablement. It was such a socialist State which the Preamble directs the centres of power Legislative, Executive and Judiciary to strive to set up.

To some extent this approach will find support in the judgment in *Minerva Mills Ltd. v. Union of India*,<sup>1</sup> speaking for the majority, Chandrachud, C. J. observed as under : "This is not mere semantic. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice—social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved."

Bhagwati, J. in his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that "the Directive principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principle of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

(8) *Unitary Government and Federal Government*. Federal government differs from unitary government in that the former has no single focus of authority to which all political decisions are finally referable. In a federal union the constituent members continue to be states, in the sense that they retain certain sovereign rights. Thus in the United States of America each state has its own courts and its own criminal laws beyond which there is no appeal. Under federal government there is a double citizenship, a citizenship of the union as a whole, possessed by the people of the constituent states, and a citizenship of each constituent. The citizenship of the whole distinguishes the federal union from a mere alliance or confederation of states. The citizenship of the part differentiates it from a unitary state. Within the United Kingdom, for example, Scotland may have a Local Government Board, but administrative devolution of this sort involves no separate citizenship.

### 28.8. *Aspects of Government.*

The Government under the Constitution is federal as opposed to a unitary Government. It is republican as opposed to a monarchical. It is secular not a theocratic government. It is not dictatorial or totalitarian. It is a liberal democracy.

Normative aspects of government deal with such abstract questions as justice, equity, equality. Through these, men define their lasting values, their ideas of right and wrong. Normative theory represents, therefore, certain speculations about those aims and activities of government which embody the central values and ultimate ends of a political community ; it defines political legitimacy.

In contrast, structural principles are those which deal with the arrangements and instruments involved in governmental decision-making. Of course, we they are related to normative issues insofar as the form of a government is seen as a means of attaining the ends of society.<sup>2</sup>

1. (1981) 1 SCR 206 : 1980 SC 1789 ; *D. S. Nakara v. Union of India*, 1982 SC 139.

2. *International Encyclopedia of Social Sciences*, Vol. 6, p. 216.

The normative assumption is that a social system is composed of individuals or groups with an equal right to be represented, structurally, it is assumed that a government must reflect proper representation; the behavioral assumption is that competitive conflict between the members of the social system renders representative forms necessary. This system therefore displays the following characteristics: the unit of which the social system is composed is the individual; the ends of the individuals are maximized; the structure of government is organized in such a way that a plurality of ends is maximized; the decisions of government, by maximizing a plurality of ends, maintain balance or harmony in the social system; and the principle of legitimacy is equity.<sup>1</sup>

There is another concept of Government alternative to the liberal democratic one. It implies a role for government, which directs society toward higher ends. Evolutionary in conception, it stresses the role of the community over and against the role of the individual. Although modern organic conceptions elevate man to a central position, they emphasize that the community is the instrument of his perfection; such views are endemic in revolutionary governments, which see themselves as the instruments of social transformation.

'Government is the instrument by means of which change is produced in the social system. The purposes and objects of such change are defined by government. The organization of government will depend on the best means to accomplish these purposes. The activities of government will include whatever symbolic manipulation through education, communications media, etc., is necessary to affect both the content and manner of policy decision making pursuant to changes in the social system.'<sup>2</sup>

### 18.9. Political Power—Division of.

Since the time of Aristotle, it has been generally agreed that political power is divisible into three broad categories. There is, first, the legislative power. It enacts the general rules of the society. It lays down the principles, by which the members of the society must set their course. There is, secondly, the executive power. It seeks to apply those rules to particular situations; where, for instance, an old Age Pension Law has been enacted, it pays out the specified sum to those entitled to receive it. There is, thirdly, the judicial power. This determines the manner in which the work of the executive has been fulfilled. It sees to it that the exercise of executive authority conforms to the general rules laid down by the legislature; it may, as in *Ex parte O'Brien*, declare that the particular order issued is, in fact, *ultra vires*. It settles also the relationship between private citizens, on the one hand, and between citizens and the government upon the other, where these give rise to problems which do not admit of solution by agreement.<sup>3</sup>

It is believed to be one of the Chief merits of the American system of Constitutional Law that all the powers entrusted to government, whether state or national are divided into the three grand departments, the executive, the legislative and the judicial.<sup>4</sup>

1. *International Encyclopedia of Social Sciences*, Vol. 5, p. 216.

2. *Ibid*, p. 217.

3. Laak: *Grammar of Politics*, p. 236.

4. *Kilbourn v. Thompson*, 103 US 168 : 26 L ed 177.



The theoretical distinction between the three powers of the State must be seen against the background of the doctrine of the separation of powers.<sup>1</sup>

From the legal point of view, government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers, together with certain private persons or corporations exercising public functions. The structure of the machinery of government, and the regulation of the powers and duties which belong to the different parts of this structure, are defined by the constitution and also by the law which also prescribes to some extent, the mode in which these powers are to be exercised or these duties are to be performed.<sup>1</sup>

"Political theory has long distinguished between legislative and executive acts. This formal distinction is no longer adequate. First, the political executive can perform the leadership functions traditionally assigned to the legislature. Second, it possesses independent powers for instance, in foreign policy and defence. Third, the practice of delegated legislation has given vast, albeit subordinate, legislative powers to the executive. Finally, the law enacted by the legislature is initiated, prepared, and drafted by the political executive. Policy initiation has become an executive prerogative. The legislative process tends to be increasingly one-sided. In the political systems that have adopted cabinet Government, legislative scrutiny is of no significance, and this is virtually the case in all cabinet systems that have a strong, disciplined party system. Only in the United States does the legislature continue to have genuinely independent power of legislative scrutiny and initiative. Even so, Congressional initiative tends to be limited to scrutiny and amendment of proposals already submitted by the executive."

The executive power in turn is often differentiated into two separate functions, the so-called political and the so-called administrative function. To the former are usually referred certain acts which are aimed at the direction of administration and are therefore politically important. They are performed by the highest administrative organs, such as the head of State and the chief of various administrative departments. These acts, too, are acts of execution; by these acts, too, general legal norms are executed. Many of these acts are left largely to the discretion of the executive organs. But no amount of discretion can divest an act of the executive power from its character of a law-executing Act. Accordingly the acts of the highest executive organs too are acts which execute general legal norms. The differentiation of the executive power into a governmental (political) and an administrative function has, therefore, a political rather than a juristic character. From a legal point of view, one might designate the whole domain of the executive power as administration.

By legislative power or legislation one does not understand the entire function of creating law, but a special aspect of this function, the creation of general norms. "A law," a product of the legislative process is essentially a general norm, or a complex of such norms.

By legislation, further, is understood not the creation of all general norms, but only the creation of general norms by special organs, namely by the so-called legislative bodies.

The creation of general norms by an organ other than the legislative body, namely, by organs of the executive or judicial power, is usually conceived of as an executive or a judicial function.

1. Halsbury: *Laws of England*, Vol. 34th Ed. part 804.

(220, 020 of 1801)

From a functional point of view, there is no essential difference between these norms and "laws" or statutes (general norms) created by the legislative body. The general norms created by the legislative body are called "statutes" in contradistinction to those general norms which exceptionally, an organ other than the legislative body the head of State or other executive or judicial organs, may create. The general norms issued by organs of the executive power are usually not called "statutes" but "ordinances" or "regulations."<sup>1</sup>

It is only as an exception that the organs of the executive and judicial powers create general norms. Their typical task is to create individual norms on the basis of general norms which are created by legislation and custom, and to put into effect the sanctions stipulated by these general and individual norms.

#### 28.10. *Article 12—Meaning of State*

Art. 12 of the Constitution gives an inclusive definition of the word "the State" and within these words of that Article are included, (i) the Government and Parliament of India, (ii) the Government and the legislature of each of the States, and (iii) all local or other authorities. These are the only authorities which are included in the words "the State" in Art. 12 for the purpose of Part III. Then follow the words which qualify the words "all local or other authorities within the territory of India" or "under the control of the Government of India".

#### 28.11. *Local bodies—meaning of*

A proper and careful scrutiny of the language of Section 3 (31) of the General Clauses Act which defines the term "local authority" suggests that an authority, in order to be a local Authority, must be of a like nature and character as a Municipal committee, District Board or Body of Port Commissioner possessing therefore many if not all, of the distinctive attributes and characteristics of a Municipal Committee, District Board or Body of Port Commissioner, but possessing one essential feature, namely, that it is legally entitled to or entrusted by the Government, with the control and management of a Municipal or local fund. The authorities must have separate legal existence as corporate bodies. They must not be mere governmental agencies but must be legally independent entities. They must function in a defined area and must ordinarily, wholly or partly directly or indirectly, be elected by the inhabitants of the area. Next they must enjoy a certain degree of autonomy with freedom to decide for themselves questions of policy affecting the area administered by them. The autonomy may not be complete and the degree of dependence may vary considerably but, and appreciable measure of autonomy there must be. They must be entrusted by statute with such governmental functions and duties as are usually entrusted to Municipal bodies, such as those connected with providing amenities, to the inhabitants of the locality, like health and education services, water and sewerage; town planning and development, roads, markets transportation, social welfare services etc. etc. Broadly they may be entrusted with the performance of Civic duties and functions which would otherwise be governmental duties/functions. Finally they must have the power to raise funds for the furtherance of their activities and the fulfilment of their projects by levying taxes, rates, charges or fees. This may be in addition to moneys provided by Government obtained by borrowing or otherwise. What is essential is that control or management of the fund must vest in the authority.<sup>2</sup>

1. Kelson : *General Theory of Law and State*, p. 257.

2. *Union of India v. Jain*, 1981 SC 950 (1952).

In *Municipal Corporation of Delhi v. Birla Cotton Spinning & Weaving Mills Delhi*,<sup>1</sup> Hidayatullah, J., described some of the attributes of local bodies in this manner : "Local bodies are subordinate branches of Government activity. They are political sub-divisions and agencies which exercise a part of State functions. (As they are intended to carry on local self-government the power of taxation is a necessary adjunct to their other powers). They function under the supervision of the Government".

In *Valljibhai Muljibhai Soneji v. State of Bombay*<sup>2</sup> one of the questions was whether Trading Corporation was local Authority as defined by Sec. 3 (31) of the General Clauses Act, 1897. It was held that it was not, because it was not an authority legally entitled to or entrusted by the Government with, control or management of a local fund. It was observed that though the Corporation was furnished with funds by the Government for commencing its business that would not make the funds of the Corporation (local funds). The Delhi Development Authority was held to be a local Authority.<sup>3</sup>

### 28.13. Control of India—meaning of.

The local or other authorities which are included within the words "the State" of Art. 12 are of two kinds, namely, (i) those within the territory of India, and (ii) those under the control of the Government of India. There are thus two qualifying clauses to "all local or other authorities". These clauses are (i) within the territory of India and (ii) under the control of the Government of India. It would be grammatically wrong to read the words under the control of the Government of India" the qualifying the word "territory". From the scheme of Art. 12 it is clear that three classes of authorities are meant to be included in the words "the State", there ; and the third class is of two kinds and the qualifying words which follow "all local or other authorities" define the two types of such local or other authorities as already indicated above. Further all local or other authorities within the territory of India included all authorities within the territory of India whether under the control of the Government of India or the Governments of various States and even autonomous authorities which may not be under the control of the Government at all. In contradiction to this the second qualifying clause refers only to such authorities as are under the control of the Government of India and so the second qualifying clause must govern the word "authorities".<sup>4</sup>

In *Ramamurthy v. Chief Commr. Pondichery*,<sup>5</sup> it was contended that the words "under the control of the Government of India" did not qualify the word "authorities" therein but qualified the word "territory", and all that was required was that the territory even if it was not the territory of India should be under the control of the Government of India, and if the territory was under the control of the Government of India, all local or other authorities in such territory would be included in the word "the State". The contention on behalf of the respondents was that the words "under the control of the Government of India" qualify the word "authorities" and not the word "territory" and the relevant part of Art. 12 on its true interpretation would read thus : "all local or other authorities under the control of the Government of India."

1. (1968) 3 SQR 261 (288) : 1968 SC 1232.

2. (1964) 3 SCR 686 : 1963 SC 1890.

3. *Union of India v. Jain*, 1981 SC 950 (952).

4. *Ramamurthy v. Chief Commr.*, 1963 SC 1464 (1468).

5. 1963 S. C. 1464.

The Interpretation put forward on behalf of the respondent was held by the Supreme Court to be correct both grammatically and otherwise. Wanchoo, J. said: "All local or other authorities would thus be of two kinds, namely, (i) those within the territory of India, and (ii) those under the control of the Government of India. In the latter case, there is no qualification that should be within the territory of India. It is enough if they are under the control of the Government of India wherever they may be."

### 28.14. State not quasi-judicial body.

A purely executive or administrative authority can always be directed by the Government of India under which it is functioning to act in a particular manner with respect to its functions. This, however, cannot be said of a quasi-judicial or judicial authority even though the Government of India may have appointed the authority and may be paying it and may have the right to take disciplinary action against it in certain eventualities. It is not open to the Government of India to control the function of a quasi-judicial or judicial authority and direct it to decide a particular matter before it in a particular way.

The control envisaged under Art. 12 is control of the functions of the authorities and it is only when the Government of India can control the function of an authority that it can be said that the authority is under the control of the Government of India. Such control is possible in the case of a purely executive or administrative authority; it is impossible in the case of a quasi-judicial or judicial authority, for in the very nature of things, where rule of law prevails, it is not open to the Government be it the Government of India or the Government of a State, to direct a quasi-judicial or judicial authority to decide a particular matter before it in a particular manner. Therefore, this being the nature of the control which the Government of India must exercise in order that an authority, functioning outside the territory of India may be said to be an authority under the control of the Government of India within the meaning of Art. 12. A quasi-judicial or a judicial authority cannot be said to be an authority under the control of the Government of India within this meaning. The Appellate Authority being quasi-judicial could not be directed by the Government of India to decide a particular matter before it in a particular manner and therefore it cannot be said that it is an authority under the control of the Government of India. Judicial or quasi-judicial authorities functioning in territories administered by the Government of India but outside the territory of India cannot be said to be authorities under the control of the Government of India within the meaning of Art. 12 and therefore Art. 12 would not apply to such authorities functioning outside the territory of India.

The reason why writ was not issued in *Masthan Sahib's* case, was that the quasi-judicial authority was outside the territory of India and the Supreme Court held that if the authority were of an executive or administrative nature, a writ could have been issued to the Government of India directing them to give effect to the decision of the Court by the exercise of their power of control over the authority outside the territory of India. But as the authority in that case was a quasi-judicial authority, resort to such a procedure was not possible and if the orders or directions could not be directly enforced against the authority in Pondicherry, the order would be ineffective. This clearly implied that the quasi-judicial authority was not under the control of the Government of India like an executive or administrative authority.

1. *Ramamurthy v. Chief Commr.*, 1963 SC 1464 (1469).

2. 1962 SC 797.

3. *Ibid.*, p. 1468.

In *Ramamurthy v. Chief Commissioner Pondicherry*,<sup>1</sup> the petitioners challenged the order of the Chief Commissioner of Pondicherry acting as the appellate authority under the Motor Vehicles Act and the Supreme Court held that no writ could be issued under Article 32 read with Article 12 against this quasi-judicial authority outside the territory of India even though that authority might have been appointed by the Government of India, might be paid by the Government of India, or the Government of India might have the power of disciplinary action against it.

As no writ could be issued to the Appellate Authority at the time when the order under challenge was passed, no writ would issue when after Pondicherry had become part of the territory of India, for that would be giving retrospective operation to the Constitution for this purpose which obviously could not be done.<sup>2</sup>

### 28.15. Judiciary not included in State

In *Budhan Choudhary v. State of Bihar*,<sup>3</sup> it was suggested that discrimination may be brought either by legislature or the executive or even the judiciary and the intention of Article 14 extended to all actions of the state denying equal protection of the laws whether it be the action of any one of the three limbs of the state. But Das, J., said that the constitution did not assure unanimity of decision or immunity from merely erroneous action, whether by the courts or the executive agencies of state. The judicial decision must necessarily depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there was shown to be present in it an element of intentional and purposeful discrimination.<sup>4</sup> In *Amirabbas v. State of M.P.*,<sup>5</sup> it was held that relief under Article 32 for enforcement of a right conferred by Chapter III could be granted only on proof that right and infringement thereof and if by the adjudication by the court of competent jurisdiction right claimed had been negatived, a petition to the Supreme Court under Article 32 of the Constitution for the enforcement of that right notwithstanding the adjudication of the Civil Court could not be entertained.

The argument that the impugned order affects rights of the petitioners under Art. 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the Appellate Court. But it is singularly inappropriate to assume judicial decision pronounced by a Judge of competent jurisdiction in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Art. 19(1) when the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by Court in or in relation to a matter

1. 1963 SC 1464 (1469), (1963) 21-32 L.J. 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 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brought before it for its decision cannot be said to affect the fundamental rights of citizens under Art. 19 (1).<sup>1</sup>

With regard to the case of *Budhan Chowdhary v. State of Bihar*<sup>2</sup>, Gajendragadkar, C.J. said : 'In fact, the closing observations made in the judgment themselves indicate that the Supreme Court was of the view that any judicial order was sought to be attacked on the ground that it was inconsistent with Art. 14, the proper remedy to challenge such an order would be an appeal or revision as may be provided by law. The court said that : judicial decisions rendered by Courts of competent jurisdiction in or in relation to matter brought before them can be assailed on the ground that they violate Art. 14.'<sup>3</sup>

In *Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, Aurangabad*,<sup>4</sup> Sarkar, J. speaking for the Court, has observed that the decision of the Regional Transport Authority which was challenged before the court may have been right or wrong, but that they were unable to see how that decision could offend Art. 14 or any other fundamental right of the petitioner. The learned Judge further observed that the Regional Transport Authority was acting as a quasi judicial body and if it has made any mistake in its decision there are appropriate remedies to the petitioner for obtaining relief. It cannot complain of a breach of Art. 14. It is true that in this case also the larger issue as to whether the orders passed by quasijudicial tribunals can be said to affect Art. 14, does not appear to have been fully argued. It is clear that the observations made by the Supreme Court in this case unambiguously indicate that it would be inappropriate to suggest that the decision rendered by a judicial tribunal can be described as offending Art. 14 at all. It may be a right or wrong decision, and if it is a wrong decision it can be corrected by appeal or revision as may be permitted by law, but it cannot be said *per se* to contravene Art. 14.<sup>5</sup>

Sarkar, Shah & Bachawat, JJ. agreed with Gajendragadkar C.J, Hidayatullah in his dissenting judgment had said :—

"To begin with we have the definition of 'State' in Art. 12. That definition does not say fully what may be included in the word 'state' but, although it says that the word includes certain authorities, it does not consider it necessary to say that Courts and Judges are excluded. The reason is made obvious at once, if we consider Article 13 (2). There the word 'State' must obviously include 'Courts' because otherwise 'Courts' will be enabled to make rules which take away or abridge fundamental rights.<sup>6</sup>

These provisions show that it cannot be claimed as a general proposition that no action of a Judge can ever be questioned on the ground of breach of fundamental rights. The Judge no doubt functions, most of the time, to decide controversies between the parties in which controversies the Judge does not figure but occasion may arise collaterally where the matter may be between the Judge and fundamental rights of any person by reason of the Judge's action. It is true that Judges, as the upholders of the Constitution and the laws, are likely to err but the possibility of their acting contrary to the Constitution cannot be completely excluded. In the context of Articles 14,

1. *Naresh v. State of Maharashtra*, 1967 SC 11.

2. 1955 SC 191.

3. *Naresh v. State of Maharashtra*, 1967 SC 11 (13, 14), para 47.

4. 1960 SC 801.

5. *Naresh v. State of Maharashtra*, 1967 SC 11 (14).

6. *Ibid.*, p. 28.

15 (1) (b) and 19 (1) (a) and (d) it is easy to visualize breaches by almost any one including a Judge.<sup>1</sup>

### 28.16. Corporation when agency of government.

Corporations are frequently used by the government as public agencies for carrying on certain lines of governmental activity. It is not always easy to ascertain why the corporate instrumentality is adopted for these functions rather than setting up another department of government. But it has been found that a corporation may more readily apply effective business methods of management. In a corporate public business it is more likely that the executive will be able to focus their energies on new and unpaid methods of attaining results.<sup>2</sup> In England also there are public corporations which control the public industries and services.<sup>3</sup>

So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of government is to be found in the Government of India Resolution in Industrial Policy dated April 6, 1948 where it was stated *inter alia* that "management of State enterprise will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this". It was in pursuance of the policy envisaged in this and subsequent resolutions on industrial policy that corporations were created by government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by government departments through its service personnel, but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of government would obviously be subject to the same limitations in the field of constitutional and administrative law as government itself, though in the eye of the law, they would be distinct and independent legal entities. If government acting through its officers is subject to certain constitutional and public law limitations, it must follow *a fortiori* that government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.<sup>4</sup>

The tasks of government multiplied with the advent of the welfare state and consequently, the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. At the same time, 'bureaucracy' came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and be separately accountable.<sup>5</sup>

The public corporation therefore became a third arm of the conduct of basic industries through giant corporations is now a permanent feature of public life.<sup>6</sup>

1. *Naresh v. State of Maharashtra*, 1967 SC 1 (29).

2. *Ballantine on Corporation*, p. 26.

3. *Halsbury's Law of England*, Ed 4 Vol. 9 1203.

4. *R.D. Sethy v. International Airport Authority*, (1979) 3 SCC 489 (506-507) : 1979 SC 1626. *Som Prakash v. Union of India*, (1981) 1 SCC 449 (468) : 1981 SC 212.

5. *Sukdev Singh v. Bhagatram*, 1975 SC 1331 (1350) : (1975) 3 SCR 619.

6. *Sukhdev Singh v. Bhagatram*, 1975 SC 1331 (1350) : (1975) 3 SCR 619.

**28.19. Summary Test.**

The Constitution was framed on the theory that limitation should exist on the exercise of power by the State. The assumption was that the State alone was competent to wield power. But the essential problem of liberty and equality is one of freedom from arbitrary restriction and discrimination whenever and however imposed. The Constitution therefore, should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public corporation being a creation of the State is subject to the constitutional limitation as the State itself. The preconditions of this are two, namely, that the corporation is created by State and the existence of power in the corporation to invade the constitutional right of individual.

**28.20. Statutory Authority.**

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956. Where a corporation is wholly controlled by Government not only in its policy-making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committees of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government, though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all-inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not.<sup>2</sup>

**28.21. Tests.**

It may be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would

1. *Sukhdev Singh v. Bhagat Ram*, 1975 SC 1831 (1951).

2. *R. D. Bhaty v. International Airport Authority*, 1979 SC 1623 (1979) 3 SCR 1014 : (1979) 3 SCC 489 (1979).



afford some indication of the corporation being impregnated with governmental character. But where financial assistance is not so extensive, it may not by itself, without anything more, render the corporation an instrumentality or agency of government, for there are many private institutions which are in receipt of financial assistance from the State and merely on that account they cannot be classified as State agencies. Equally a mere finding of some control by the State would not be determinative of the question "since a State has considerable measure of control under its police power over all types of business operations." But "a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action".<sup>1</sup> So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporations' ties to the State.<sup>2</sup>

There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed.<sup>3</sup> It was pointed out by Douglas, J. in *Evans v. Newton*,<sup>4</sup> that "where private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State". Of course, with the growth of the welfare State, it is very difficult to define what functions are governmental and are not, because, as pointed out by Villmer, L. J., in *Pfizer v. Ministry of Health*,<sup>5</sup> there has been since mid-victorian times, a revolution in political thought and a totally different conception prevails today as to what is and what is not within the functions of Government". Douglas, J., also observed to the same effect in *New York v. United States*.<sup>6</sup> "A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprises".

### 28.18. When Corporation—Instrumentality or agency of State.

It would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.<sup>7</sup> This is precisely what was pointed out by Mathew, J., in *Sukhdev v. Bhagatram*,<sup>8</sup> (supra) where the learned Judge said that "institutions engaged in matters of high public interest or performing public functions are by virtue of nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions."

1. *Sukhdev v. Bhagatram*, (1975) 3 SCR 619 (650) : 1975 SC 1331 : (1975) 1 SCC 421 (454) : *R. D. Shetty v. International Airport Authority*, (1979) 3 SCC 489 (508).

2. *Jackson v. Metropolitan Edison Co.*, 42 L ed 2d 477.

3. Arthur S. Miller : 'The Constitutional Law of the 'Security State'.

4. 15 L ed 2d 373.

5. 1964 1 Ch. 614 : (1963) 3 All ER 779.

6. 1945 326 US 572 : 90 L ed 326.

7. *R. D. Shetty v. v. Airport Authority*, 1979 SC 1640.

8. 1975 SC 1331.

There are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. Some of these factors may be summarised as : whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance, whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions. This particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency. Moreover even amongst these factors which have been described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case. "The dispositive question in any State action case", as pointed out by Douglas, J., in *Jackson v. Metropolitan Edison Company*,<sup>1</sup> "is not whether any single fact or relationship presents a sufficient degree of State involvement but rather whether the aggregate of all relevant factors compels a finding of State responsibility". It is not enough to examine seriatim each of the factors upon which a corporation is claimed to be an instrumentality or agency of Government and to dismiss each individually as being insufficient to support a finding of that effect. It is the aggregate or cumulative effect of all relevant factors that is controlling."<sup>2</sup>

*Actions of Public Corporation to be relevant not arbitrary.*

Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

But the decisions shows that even this test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact it is difficult to distinguish between governmental functions and non-governmental functions. But the public nature of the function, if impregnated with governmental character or

1. (1974) 419 US 345: 42 L ed 477.

2. *Ibid.*, p. 489.

"tied or\* entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference.<sup>1</sup>

The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be called out from the judgment in the *International Airport Authority's* case<sup>2</sup>. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. The relevant tests gathered from the decision in the *International Authority's* case may be summarised as follows :

**28.19. Summary tests.**

- (1) "One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."
- (2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."
- (3) "It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected"
- (4) "Existence of "deep and pervasive State control" may afford an indication that the Corporation is a State agency or instrumentality."
- (5) "If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."
- (6) "Specifically, if a department of Govt. is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the *International Airport Authority's* case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12.<sup>3</sup>

If the entity is no more than a company under the company law or society under the law relating to registered societies or cooperative societies it cannot be called an authority. A ration shop run by a cooperative store financed by government is not an authority, being a mere merchant, not a sharer of State power. 'Authority' in law belongs to the province of power : "Authority (in Administrative Law) is a body having jurisdiction in certain matters of a public nature." Therefore, the ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either or himself or of other persons must be

<sup>1</sup> *R. D. Shetty v. International Airport Authority*, 1979 SC 1628 : (1979) 3 SCC 489 (510).

<sup>2</sup> 1979 SC 1628.

<sup>3</sup> *Ajay Hasia v. Khalid Mujib*, 1981 SC 897 (496) ; *U. P. Warehousing Corp. v. Vijay Narain*, 1980 SC 840.

present ab extra to make a person an authority. When the person is an 'agent or instrument of the functions of the State' the power is public.<sup>1</sup>

The *U. P. Warehousing Corporation case*<sup>2</sup> related to a statutory corporation and the litigation was by an employee for wrongful dismissal. One of the questions considered there was the maintainability of a writ petition against a statutory corporation at the instance of an employee. The court reviewed many decisions, Indian and English, and upheld the employee's contention that the writ could and should issue to such a body if illegality were established.<sup>3</sup>

The function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes and the defence of its frontiers. It is now the function of the State to secure 'social, economic and political justice', to preserve 'liberty of thought, expression, belief, faith and worship', and to ensure 'equality of status and of opportunity.' That is the proclamation of the people in the preamble to the Constitution. The desire to attain these objectives has necessarily resulted in intense governmental activity in manifold ways. Legislative and executive activities have reached very far and have touched very many aspects of a citizen's life. The government, directly or through the corporations, set up by it or owned by it, now owns or manages, a large number of industries and institutions.<sup>4</sup>

The government, its agencies and instrumentalities, corporations set up by the government under the statutes and corporation incorporated under the Companies Act but owned by the government have thus become the biggest employers in the country. There is no good reason why, if government is bound to observe the equality clauses of the Constitution in the matter of employment and in its dealings with the employees, the corporation set up or owned by the government should not be equally bound and why, instead, such corporation could become citadels of patronage and arbitrary action. In a country like ours which teems with population, where the State, its agencies, its instrumentalities and its corporations are the biggest employers and where millions seek employment and security, to confine the applicability of the equality clauses of the Constitution, in relation to matters of employment, strictly to direct employment under the government is perhaps to mock at the Constitution and the people. Some element of 'public' employment is all that is necessary to take the employee beyond the reach of the rule which denies him access to a court to enforce a contract of employment and denies him the protection of Articles 14 and 16 of the Constitution. After all employment in the public sector has grown to vast dimensions and employees in the public sector often discharge as onerous duties as civil servants and participate in activities vital to our country's economy. In growing realisation of the importance of employment in the public sector, Parliament and the Legislatures of the states have declared persons in the service of local authorities, Government companies and statutory corporations as public servants and, extended to them by express enactment the protection usually extended to civil servants from suits and prosecution. It is, therefore, but right that the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of servants.<sup>5</sup>

1. *Som Prakash Rekhi v. Union of India*, (1981) 1 SCC 449 (462).

2. (1980) 3 SCC 459 : 1980 SC 479.

3. *Ibid.* p. 464.

4. *Ibid.* p. 465.

5. *Ibid.*, p. 465-66.

## 28.20. Statutory Authority.

Article 12 of the Constitution is a special definition of the word State with a broader, far from restricting the concept of 'State' it enlarges the scope to embrace all authorities under the control of Government.

All Statutory corporations are authorities within the meaning of Article 12. International Air Port Authority of India was constituted under the International Air Port Authority Act, 1971. Its Chairman and members were all persons nominated by the Central Government and the Central Government had also the power to terminate their appointment as also to dismiss them in certain specified circumstances. The Central Government was also vested with power to take away the management of any air port from the Authority and to entrust it to any other person of authority and for certain specified reasons, the Central Government could also supersede the Authority to take into account these and other provisions. The Supreme Court held that the Authority was an instrumentality or agency of the Government and fell within the definition of the State, both on the narrow-view taken by the majority in *Sukdev Singh v. Bhagatram*<sup>1</sup> as also on the broader view of Mathew, J. approved.

The concurring judgment in the *Rajasthan Electricity Board*<sup>2</sup>, said that the Board was invested by statute with extensive powers of control over electricity undertakings. The power of the Board to make rules and regulations and to administer the Act was said to be in substance the sovereign power of the State delegated to the Board.

The Oil and Natural Gas Commission Act conferred power of entry on employees of the Commission upon any land or premises for the purpose of lawfully carrying out works by the Commission. The members and employees of the Commission were public servants within the meaning of Section 21 of the Indian Penal Code. The Commission enjoyed protection of action taken under the Act.

The Life Insurance Act provided that if any person lawfully withheld or failed to deliver to the Corporation any property which had been transferred to and vested in the Corporation or wilfully applied them to purposes other than those expressed or authorised by the Act, he shall, on the complaint of the Corporation be punishable with imprisonment which may extend to year or with fine which may extend to one thousand rupees or with both. The Corporation also enjoyed protection of action taken under the Act.

The Industrial Finance Corporation Act states that whoever in any bill of lading, warehouse receipt or other instrument given to the Corporation whereby security is given to the Corporation for accommodation granted by wilfully makes any false statement or knowingly permits any false statement to be made shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to two thousand rupees or with both. Further whoever without the consent in writing of the Corporation uses the name of the Corporation in any prospectus or advertisement shall be punishable with imprisonment for a term which may extend to six months or with fine

1. *R. D. Shetty v. International Airport Authority*, (1979) 3 SCC 489 (521); *Sukhdev Singh v. Bhagatram*, 1975 SC 1331. (1342)

2. *Rajasthan Electricity Board v. Mohan Lal*, 1967 SC 1857 : (1967) 3 SCR 377 ; *Sukh Dev Singh v. Bharatram* 1975 SC 1331 (1342).

which may extend to one thousand rupees or with both. The Corporation enjoys protection of action taken under the Act. A company incorporated under the Indian Companies Act does not enjoy these privileges.

In *Sukhdev Singh v. Bhagat Ram*,<sup>1</sup> questions arose as to whether these corporations could be described to be authorities within the meaning of Article 12 of the Constitution. In the *Rajasthan Electricity Board* case,<sup>2</sup> it was said that the power to give directions, the disobedience of which must be punishable as a criminal offence would furnish one of the reasons for characterising the body as an authority within the meaning of Article 12. The power to make rules or regulations and to administer or enforce them would be one of the elements of authorities contemplated in Article 12. Authorities envisaged in Article 12 are described as instrumentalities of State action. On behalf of the State it was contended that the Oil and Natural Gas Commission as well as Industrial Finance Corporation were not granted immunity from taxation and therefore the liability to be taxed would indicate that the Corporation was not a State authority. Reference is made to Article 289 which speaks of exemption of property and income of a State from Union taxation. The liability to taxation will not detract from the Corporation being an authority within the meaning of Art. 12. Article 289 empowers Union to impose tax in respect of trade or business carried on by or on behalf of a State.

It was held that these statutory bodies were authorities within the meaning of Art. 12 of the Constitution.

In *Som Prakash v. Union of India*,<sup>3</sup> Krishna Iyer and Chinappa Reddy, JJ (Pathak, J. dissenting) held that the Bharat Petroleum Ltd. was a State agency within meaning of Art. 12.

The expression "other authorities" in Art. 12 will include all constitutional or statutory authorities on whom powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Art. 19 (1) (g). In Part IV the State has been given the same meaning as in Art. 12 and one of the Directive Principles laid down in Art. 46 is that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The State, as defined in Art. 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The State, as constituted by our Constitution, is further specifically empowered under Art. 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word "State" as used in Art. 12.

"The State" in Art. 12 comprehends bodies created for the purpose of promoting economic activities. These bodies may be statutory corporations, registered societies, government companies or other like entities.

In *Praga Tools Corporation v. Immanuel*,<sup>4</sup> the Supreme Court was called upon to consider the enforceability of two industrial settlements against the management which was a company with substantial share-holding for the Union Government and the Government of Andhra Pradesh. There was no specific

1. 1975 SC 1331.

2. 1967 SC 1857.

3. (1981) 1 SCC 449.

4. (1969) 3 SCR 773 : 1969 SC 1306.

reference to Art. 12 as such although it was mentioned early in the judgment that the company was a separate legal entity and could not be said to be "either a Government corporation or an industry run by or under the authority of the Union Government." It must be noticed that 12% shares in the company were held by private individuals and nothing more was known about the plenary control by Government. A Government corporation may stand on a different footing from *Parga Tools Corporation*. The *Hindustan Steel case*,<sup>1</sup> considered the question as to whether an employee of that company was holding a post under the Union or a State so as to claim the protection of Art. 311. This claim was negatived rightly. The *Vaish College case*,<sup>2</sup> related to the status of the contractual rights of a teacher by a writ under Art. 226.

The Supreme Court, it is submitted some day will consider the justification for the following observations of Iyer, J. in *Som Prakash v. Union of India*:<sup>3</sup> "Imagine the possible result of holding that a government company, being just an entity created under a statute, not by a statute, it is not 'State'. Having regard to the directive in Art. 38 and the amplitude of the other Articles in Part IV Government may appropriately embark upon almost any activity which in a non-socialist republic may fall within the private sector, any persons' employment, entertainment, travel, rest and leisure, hospital facility and funeral service may be controlled by the State. And if all these enterprises are executed through government companies, bureaux, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedom *vis a vis* these strange beings which are government in fact but corporate in form. If only fundamental rights were forbidden access to corporations, companies, bureaux, institutes, councils and kindred bodies which act as agencies of the Administration, there may be a break-down of the rule of law and the constitutional order in a large sector of governmental activity carried on under the guise of 'Jural persons'. It may pave the way for a new tyranny by arbitrary administrators operated from behind by Government but unaccountable to Part III of the Constitution. We cannot assent to an interpretation which leads to such a disastrous conclusion unless the language of Art. 12 offers no other alternative."<sup>4</sup>

It is well known that "corporations have neither bodies to be kicked, nor souls to be damned" and Government corporations are mammoth organisations. If Part III of the Constitution is halted at the gates of corporations, Justice Louis D. Brandeis's observation will be proved true: "The main objection to the very large corporation is that it makes possible and in many cases makes inevitable the exercise of industrial absolutism. It is dangerous to exonerate corporations from the need to have constitutional conscience; and so, that interpretation, language permitting which makes governmental agencies, whatever their main, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio."<sup>5</sup>

Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The

1. (1970) 3 SCR 363 : 1970 SC 1152.

2. (1976) 2 SCR 1006 : 1976 SC 888.

3. 1981 SC 212 (230).

4. *Som Prakash v. Union of India*, 1981 SC 212 (230).

5. *Ibid.*

attainment of socio-economic justice being a conscious end of State policy there is a vast and inevitable increase in the frequency with which ordinary citizens came into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of executive Government so as to prevent its arbitrary application or exercise.<sup>1</sup>

Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. All these mean growth in the Government largessee and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms.

The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though, in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.<sup>2</sup>

As Mathew, J. stated in *Punnen Thomas v. State of Kerala*,<sup>3</sup> the Government, is not and should not be as free as an individual in selecting the recipients for its largessee, whatever its activity, the Government is still the Government and will be subject to restraints inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.<sup>4</sup>

But the question arises, what are the "other authorities" contemplated by Article 12 which falls within the definition of State? On this question considerable light is thrown by the decision of the Supreme Court in *Rajasthan Electricity Board v. Mohan Lal*.<sup>5</sup> That was a case in which the Court was called upon to consider whether the Rajasthan Electricity Board was an authority within the meaning of expression "other authorities" in Article 12. Bhargava J., delivering the judgment of the majority pointed out that the expression "other authorities" in Article 12 could include all constitutional and statutory authorities on whom powers were conferred by law. The learned Judge also said that if any body of persons had authority to issue directions the disobedience of which would be punishable as a criminal offence, that

1. *Som Prakash v. Union of India*, 1981 SC 212 (222).

2. *Ibid.*, p. 217.

3. 1969 Ker 81 (FB) ; *Som Prakash v. Union of India*, 1981 SC 212 (222).

4. *Som Prakash v. Union of India*, 1981 SC 212 (222).

5. 1967 SC 1857.



would be an indication that that authority was State. Shah, J., who delivered a separate judgment, agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression "other authorities". He said that authorities, constitutional or statutory, would fall within the expression "other authorities" only if they are invested with the sovereign power of the state, namely the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression "other authorities", if it had been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it had the sovereign power to make rules and regulations having the force of law. This test was followed by Ray, C. J., in *Sukhdev v. Bhagatram*.<sup>1</sup> Mathew, J., however, in the same case, propounded a broader test namely, whether the statutory corporation or other body or authority claimed to fall within the definition of 'State' was an instrumentality or agency of Government if it was it would fall within the meaning of the expression 'other authorities' and would be State. Whilst accepting the test laid down in *Rajasthan Electricity Board v. Mohal Lal* (supra), and followed by Ray, C. J., in *Sukhdev v. Bhagatram* (supra) Bhagwati, J. preferred to adopt the test of Governmental instrumentality or agency as one more test and perhaps a more satisfactory one for determining whether a statutory corporation, body or other authority fell within the definition of "State". If a statutory corporation, body or other authority was an instrumentality or agency of the Government, it would be an 'authority' and therefore 'State' within the meaning of the expression in Article 12.<sup>2</sup>

It is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12.<sup>3</sup>

It is also necessary to add that merely because a juristic entity may be an "authority" and therefore "state" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Arts. 209, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "Authority" within the territory of India or under the control of the Government of India is not limited in its application only to Part III and by virtue of Article 36, to Part IV, it does not extend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the

1. 1979 SC 1331.

2. *R. D. Shetty v. International Airport Authority*, 1979 SC 1628.

3. *Ibid.*, para 11.

purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. That is why the decisions of this Court in *S. L. Agarwal v. Hindustan Steel Ltd.*,<sup>1</sup> and other cases involving the applicability of Article 311 have no relevance to the issue before us.<sup>2</sup>

The question which arose was whether the Council of Scientific and Industrial Research which was juridically a society registered under the Societies Registration Act, 1860 was an "authority" within the meaning of Article 12. The test which the Court applied for determining that question was the same as the one laid down in the International Airport Authority's case namely, whether the Council was an instrumentality or agency of the Government. The Court implicitly assented to the proposition that if the Council were an agency of the Government, it would undoubtedly be an "authority". But, having regard to the various features enumerated in the judgment, the Court held that the Council was not an agency of the Government and hence could not be regarded as an "authority". The Court did not rest its conclusion on the ground that the Council was a society registered under the Societies Registration Act, 1860, but proceeded to consider various other features of the Council for arriving at the conclusion that it was not an agency of the Government and therefore not an "authority". This would have been totally unnecessary if the view of the Court were that a society registered under the Societies Registration Act can never be an "authority" within the meaning of Art. 12.<sup>3</sup>

In *Ajay Hasia v. Khalid Mujib*,<sup>4</sup> the Supreme Court examined the question whether the Society in that case was an "Authority" falling within the definition of "State" in Article 12. Is it an instrumentality or agency of the Government? Bhagwati, J. said the answer must obviously be in the affirmative if we have regard to the Memorandum of Association and the Rules of the Society. The composition of the Society is dominated by the representatives appointed by the Central Government and the Governments of Jammu and Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the college are provided entirely by the Central Government and the Government of Jammu and Kashmir and even if any other monies are to be received by the Society, it can be done only with the approval of the State and the Central Governments. The Rules to be made by the Society are also required to have the prior approval of the State and the Central Governments and the accounts of the Society have also to be submitted to both the Governments for their scrutiny and satisfaction. The Society is also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matters dealt with in the report of the Reviewing Committee. The control of the State and the Central Governments is indeed so deep and pervasive that no immovable property of the Society can be disposed of in any manner without the approval of both the Governments. The State and the Central Governments have even the power to appoint any other person or persons to be member of the Society and any member of the Society other than a member representing the State or Central Government can be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors, which is in-charge of general superintendence, direction and control of the affairs of

1. (1970) 3 SCR 363 : 1970 SC 1150.

2. *Ajay Hasia v. Khalid Mujib*, 1981 SC 487.

3. *Sukhdev Singh v. Bhagatram*, (1975) 3 SCR 619 : 1975 SC 1331.

4. 1981 SC 487.

Society and of its income and property is also largely controlled by the affairs of the society and of its income and property is also largely controlled by nominee of the State and the Central Governments. It will thus be seen that the State Government and by reason of the provision for approval, the Central Government also, have full control of the working of the Society and it would not be incorrect to say that the Society is merely a projection of the State and the Central Governments and to use the words of Ray, C. J. in *Sukhdev Singh's*<sup>1</sup> case, the voice is that of the State and the Central Governments and the hands are also of the State and the Central Governments. We must, therefore, hold that the Society is an instrumentality or the agency of the State and the Central Governments and it is an authority within the meaning of Article 12".<sup>2</sup>

### 28.21. Government—Companies.

The ratio of the decision in *Sabhajit Tewari's*<sup>3</sup> case was examined in *Ajay Hasia's* case<sup>4</sup> and also in *Ramchandra Iyer, P. K. v. Union of India*<sup>5</sup> and it was held that the decision was not an authority for the proposition that a society registered under the Societies Registration Act, 1860 could never be regarded as an authority within the meaning of Article 12. In *Ramchandra Iyer, P. K. v. Union of India*<sup>6</sup> the argument was that the Indian Council of Agricultural Research (ICAR) being a Society registered under the Societies Registration Act, 1860 was not a State but the contention was negatived. Applying the criteria laid down in *Ajay Hasia*<sup>7</sup> it was held that the ICAR was an instrumentality or the agency of the State, and therefore it was the 'other authority' within the meaning of the expression in Article 12. In the above case a Bench of two Judges held that though *Sabhajit Tewari's* case<sup>8</sup> had not been specifically overruled in later decision its ratio was considerably watered down so as to be a decision confined to its own facts.<sup>9</sup>

Indian Statistical Institute is a society registered under the Societies Registration Act, 1860. In *Minhas, B. S. v. Indian Statistical Institute*<sup>10</sup> the Supreme Court relying on *Ajay Hasia's* case<sup>11</sup> held that the Institute was an authority within the meaning of Art. 12. The control of the Central Government is deep and pervasive and therefore to all intents and purposes it was an instrumentality of the Central Government.

The expression 'other authorities' must be given a broad and liberal interpretation, where constitutional fundamentals vital to the maintenance of the human rights are at stake and functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek<sup>12</sup> the substance,

1. 1975 SC 1331.

2. *Ajay Hasia v. Khalid Mujib*, 1981 SC 487 (497-498).

3. 1975 SC 1329.

4. 1981 SC 487 : (1981) 2 SCR 79.

5. 1984 SC 541 (548).

6. *Ibid.*, p. 548.

7. 1981 SC 487.

8. 1975 SC 1329.

9. *Ramchandra Iyer v. Union of India*, 1984 SC 541 (548).

10. 1984 SC 363.

11. 1981 SC 487.

12. *Ajay Hasia v. Khalid Mujib*, 1981 SC 487 ; *Minhas, B. S. v. I. S. I.*, 1984 SC 363 (369).

not the forms. In *Ajay Hasia v. Khalid Mujib*<sup>1</sup> the Supreme Court pointed out that the government may act through the instrumentalities or agencies juridical persons to carry out its function, since with the advent of the welfare State, its new tasks have increased manifold and such juridical persons acting as the instrumentality or agency of the government must therefore be subject to the same discipline of fundamental rights as the State. It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions or business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective management but behind the formal ownership which is cast in the corporate mould the reality is very much the deeply pervasive presence of the government. It is really the government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration can not be allowed to obliterate the true nature of the reality behind which is the Government. If a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law as the Government itself, though in the eye of law it should be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a *fortiori* that the Government acting through the instrumentality or agency of a corporation should equally be subject to same limitations. If such a corporation were to be free from the basic obligations to obey the fundamental rights, it would lead to considerable erosion of the efficiency of the fundamental rights, for in that event the government would be entitled to override the fundamental rights by adopting the stratagem of carrying out its functions through the instrumentality or agency of a corporation while retaining control over it.<sup>2</sup>

1. *Ajay Hasia v. Khalid Mujib*, 1981 SC 487.

2. 1981 SC 487 (493); *Mihes, B. S. v. India Statistical Institution*, 1984 SC 363 (369).

## Political Executive

### SYNOPSIS

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### **29.1. American Presidential and British Cabinet system.**

The Political executive consists of those institutions formally responsible for governing a political community—that is for applying its binding decisions, which may be formulated, to a greater or lesser extent, by the executive institutions themselves. The structure, function, and character of the executive have varied widely over time, and no single conceptual framework can disclose all these variations and their consequences. Yet, certain fundamentals are

clear, and on these we can concentrate our attention. The two most prevalent structural forms of the executive are the presidential and the cabinet systems.<sup>1</sup>

Cabinet Government is that system in which the real executive, the cabinet or ministry is immediately and legally responsible to the legislature or one branch of it is usually the more popular chamber for its political policies and acts and mediately or ultimately responsible to the electorate, while the titular or nominal executive. The Chief of the State occupies a position of irresponsibility.<sup>2</sup>

The cabinet system normally presuppose double character of minister and member thus executive and legislation function are inextricably commingled. There is observes Courtenay Ilbert, no such separation between the executive and legislative powers as that which forms as distinguishing mark of the American Constitution, but the relation is one of intimacy and inter-dependence. Bagehot described the British Cabinet as a hyphen, that joins, a buckle that fastens the executive and legislative together. As Lowell puts it is in its essence an informal but permanent caucus of the parliamentary chief of the party in power."<sup>3</sup>

What has been called "Presidential" Government as contradistinguished from Cabinet or Parliamentary Government, is that system in which the executive (including both the head of the State and his Ministers) is constitutionally independent of the legislature in respect to the duration of his or their tenure and irresponsible to it for his or their political policies. In such a system the Chief of State is not merely the titular executive but he is the real executive and actually exercises the powers which the Constitution and laws confer upon him.<sup>4</sup>

In the Presidential system, the president is elected by the people. He holds the highest executive office over a given period of time, during which he is not politically accountable to the legislature. All top executive officials are nominated by him and can be removed by him. In the cabinet system, on the other hand, the prime minister and his cabinet are responsible to the legislature. They are formally invested with executive power by a vote of the legislature, and their term can be suspended at any time by an adverse vote.

In the Parliamentary or Cabinet system, the immediate source of executive power is the election and the Party. In the cabinet system, the leader of the majority party becomes Prime Minister. If the party is disciplined, it is unlikely that it will overthrow the Prime Minister. Thus, while the Prime Minister is technically responsible to the legislature, he is just as immune to it as the President.<sup>5</sup>

In his introduction to Bagehot, English Constitution, Earl of Balfour comparing the Presidential system and the British Cabinet system said :

"Under the Presidential system the effective head of the natural administration is elected for a fixed term. He is practically irremovable. Even if he

1. *International Encyclopedia of Social Sciences*, Vol. 12, p. 228.

2. Garner : *Political Science and Government*, p. 323.

3. Lowell : *Government of England*, Vol. 56.

4. Garner : *Political Science and Government*, p. 340.

5. *International Encyclopedia of Social Sciences*, Vol. 12, p. 229.

6. *Ibid.*

is proved be inefficient, even if he becomes unpopular, even if his policy is unacceptable to the majority of his countrymen, he and his methods must be endured till the moment comes for a new election."

He is aided by Ministers who, however able or distinguished, have no independent political status, have probably had no congressional training, and are by law precluded from obtaining any during their term of office.

Under the Cabinet system everything is different. The head of the administration, commonly called the Prime Minister (though he has no statutory position, is selected for the post on the ground that he is the statesman best qualified to secure the support of a majority in the House of Commons. He retains it only so long as that support is forthcoming. He is the head of his Party. He must be a member of one or other of the two Houses of Parliament; and he must be competent to 'lead' the House to which he belongs. While the Cabinet Ministers of a President are merely his officials, the Prime Minister is *primus inter pares* in a Cabinet of which (according to peace-time practice) every member must, like himself, have had some parliamentary experience, and gained some parliamentary reputation.<sup>1</sup>

The President's powers are defined by the Constitution, and for their exercise (within the law) he is responsible to no man. The Prime Minister and his Cabinet, on the other hand, are restrained by no written constitution; but they are faced by critics and rivals whose position, though entirely unofficial, is as 'constitutional' as their own; they are subject to a perpetual stream of unfriendly questions to which they must make public reply; and they may at any moment be dismissed from power by a hostile vote.

"From these points of view the position of a President is far stronger than that of a Prime Minister; for he cannot be expelled from office, and his powers cannot be curtailed. But, there is another side to the picture. His prerogatives, though unassailable, are narrowly limited. He commands all the forces of the Republic, but he cannot legislate. He can appoint whom he will to office; but the Senate must approve. If his policy involves the smallest dose either of legislation or taxation (and what large policy does not ?) it rests with Congress to supply them;—and Congress may be hostile. He may pursue any foreign policy he pleases, and negotiate what treaties he thinks fit. But after his negotiation have been successfully carried through they will be entirely barren unless two third of the Senate are prepared to agree with him,—and again the Senate may be hostile".

Now the position of a Prime Minister, so much weaker intrinsically than that of a President, is often stronger where co-operation is required, because he belongs essentially to a co-operative system—a system in which nothing is self-supporting, in which all the working parts are interdependent. He and his Cabinet must co-operate or there would be no Government. His Government and the House of Commons' majority which supports it must co-operate, or the Government must resign. Moreover, these needs are not unilateral; they are mutual. The party majority which refuse to support their leaders not only hamper a policy which (be it good or bad) is that of their Government, but they probably injure their own electoral prospects. Leaders who refuse to work together not only weaken their Cabinet and their Party, but probably do little to strengthen their own political position. An administration whose

1. Bagehot : *British Constitution*, Introduction, (viii) (iv).



'policy unduly strains the loyalty of any large section of its supporters is obviously making things easy for its opponents'.<sup>1</sup>

"It would seem, then, that Cabinet Government after the British model is more closely knit than Presidential Government after the American model, and this is not because America is a federal country while Britain is a unitary one, but because the great men who founded the Republic deliberately preferred a system in which the task of conducting national affairs was entrusted to three independent organs of Government, dissimilar in character, chosen at different times, for different periods, with different duties, by electorates differently constructed, each justly claiming to be the choice of the people. There is no constitutional reason why the President, the Senate and the House of Representatives should co-operate to carry out any common policy; and it is easy to imagine cases in which they would be reluctant to do so. If these were to occur when unity and rapidity of national action were required, the country would have to trust in the political genius of its people rather than to the formal machinery provided for it by the constitution".<sup>2</sup>

The weaknesses of the British constitution are of a very different character. Whatever be its faults it certainly does not suffer from too elaborate a system of checks and balances. The House of Commons need not keep a Government in office a day longer than it likes. But if the majority decide to keep it, evidently they have every inducement to provide the money and pass the laws which the policy of that Government requires. They form part of a co-operative system, they are an element in an interdependent whole; and if we look at that whole from Bagehot's point of view, from the point of view of the business man contemplating the two-Party system, and asking himself how the business of the community can be carried on through so unwieldy a body as the British Parliament, the British form of Cabinet Government seems simple and effective.<sup>3</sup>

### 29.2. *British Cabinet system adopted by our constitution.*

In the words of Alladi Krishnaswami Aiyar "the object of the present constitutional structure was to prevent a conflict between the Executive and the Legislature and to promote harmony between the different parts of the governmental system. After weighing the pros and cons of the Parliamentary executive as they obtained in Great Britain, the Dominions and in some of the Continental Constitutions, and the Presidential type of government as it obtained in the United States of America, the Indian Constitution adopted the institution of Parliamentary Executive."

The President of the Constituent Assembly, Dr. Rajendra Prasad summed up thus :

'We have had to reconcile the position of an elected President with an elected Legislature, and in doing so, we have adopted more or less, the position of the British monarch for the President. His position is that of constitutional President. Then we come to the Ministers. They are, of course, responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so

1. Bagehot : *The British Constitution*, p. (ix).

2. *Ibid.*

3. Walter Bagehot : *The English Constitution*, Introduction p. XI.

much on account of the written word in the constitution but as a result of this very healthy convention, will become a constitutional President in all matters."

### 29.3. *Parliamentary form of government.*

Mr. K. M. Munshi, one of the members of the Drafting Committee spoke in this connection as under :

"We must not forget a very important fact that, during the last hundred years, Indian public life has largely drawn upon the traditions of British Constitutional Law. Most of us have looked up to the British model as the best. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of the country. Our constitutional traditions have become Parliamentary and we have now all our Provinces functioning more or less on the British model".<sup>1</sup>

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*,<sup>2</sup> a Constitution Bench of this Supreme Court observed as under :

"Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State....."

In *Shamsher Singh v. State of Punjab*,<sup>3</sup> a seven-Judge Bench unanimously overruled the decision in *Sardari Lal v. Union of India*<sup>4</sup> and held that "our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States". This view has not been departed from. Now in Parliamentary form of Government modelled on British model, the executive, legislative and judicial powers are in the main entrusted to separate instruments of the State. It is not for a moment suggested that there is strict or water-tight division of powers, but the functions are certainly divided. In *Halsbury's Laws of England*, Fourth Edition, Vol. 8, para 813, separation of executive, legislative and judicial powers in the Westminster model have been adverted to. It reads as under :

"It is clear that the powers of Government are divided. The executive, legislative and judicial powers are in the main entrusted to separate instruments of the State ; and local Government is further administered separately. Thus the original concentration of power in the Sovereign no longer exists ; in the eighteenth century this division of the powers of Government seemed to be such an essential characteristic of the English Constitution that it was made the basis for the doctrine of separation of powers. This doctrine, which is to the effect that in a nation which has political liberty as the direct object of its Constitution no one person or body of persons ought to be allowed to control the legislative, executive and judicial powers, or any two of them, has never in its strict form corresponded with the facts of English Government mainly because, although the functions and powers of Government are largely separate, the membership of the separate instruments of State overlap. Only in one aspect of the Constitution can it be said that the doctrine is strictly adhered to, namely, that by tradition, convention and law the judiciary is insulated from political matters."

1. See Constituent Assembly Debates, Vol. VII, p. 984.

2. (1955) 2 SCR 225, 236, 237 : 1955 SC 349 : 1955 SCJ 504.

3. (1955) 1 SCR 784 : (1974) 2 SCC 831 : 1974 SCC (L&S) 550 : 1974 SC 2193.

4. (1971) 3 SCR 461 : (1971) 1 SCC 411 : 1971 SC 1547.

Parliament that is the Legislature exercises control over the executive branch of the Government because it is a postulate of Parliamentary form of Government that Executive is responsible to the Legislature. In other words, the Government of the country is controlled by a ministry and Cabinet chosen by the electorate which while remaining responsible to the electorate is responsible directly to the Legislature and such effective means of exercising control is that any expense from Consolidated Fund of the State must have been earlier placed before the Legislature. In *Halsbury's Laws of England*, Fourth Edition, Vol. 34, para 1005, it is stated that Parliament exercises control over the actions of the executive Government and the administration of the laws it has enacted in various ways, one such being by the doctrine of the Constitution by which supply is granted annually by the House of Commons and must receive legislative sanction each year and the supply granted must be appropriated to the particular purposes for which it has been granted. It may also be noticed that the staff of the House of Commons is appointed by the House of Commons Commission comprising the Speaker, the Leader of the House of Commons, a member of the House nominated by the Leader of the Opposition and three other members appointed by the House. This Commission is charged with a duty to determine the number and remuneration and other terms and conditions of service. This Commission is also responsible for laying before the House an estimate of the expenses of the House department and of any other expenses incurred for the service of the House of Commons.<sup>1</sup>

Let us turn to relevant provisions of the Constitution. Part VI of the Constitution provides that "the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution". Chapter III in Part VI provides for State Legislature. Every State is to have a Legislature which shall consist of the Governor. It can be unicameral or bicameral as the case may be. Where the State has a unicameral Legislature, the assembly is called the Legislative Assembly. Article 170 provides for members of the Legislative Assembly being chosen by direct election from territorial constituencies in the State. Article 178 to 186 provides for officers of the State Legislatures such as the Speaker and Deputy Speaker of the Legislative Assembly and Chairman and Deputy Chairman of Legislative Council as the case may be, their powers, functions and their either vacating the office or removal from the office. Article 187 (1) provides that "the House or each House of the Legislature of a State shall have a separate secretarial staff". Marginal note of the article is "Secretariate of State Legislature". Sub-article (2) of Article 187 provides that "the Legislature of a State may by law regulate the recruitment and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State". Article 266 obliges the State to set up its Consolidated Fund. Article 203 prescribes the procedure with respect to estimates. The estimates as relate to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly but the discussion in the Legislature is permissible thereon. However, so much of the said estimates as relate to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. In other words, Legislative Assembly has complete power of purse. Article 204 casts an obligation to introduce a Bill to provide for appropriation out of the Consolidated Fund of the State of all moneys required to meet—(a) the grants so made by the Assembly; and (b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the

1. *R. S. Nayak v. A. R. Antulay*, (1984) 2 SCC 184 (232).

amount shown in the statement previously laid before the House or Houses. A conspectus of these provisions clearly indicate that the Legislature enjoys the power of purse. Even with regard to expenses charged on the Consolidated Fund of the State to be set up under Article 266, an appropriation bill has to be moved and adopted, undoubtedly, the same would be non-votable. And it is not disputed that salaries and allowances payable to MLA are not charged on the Consolidated Fund of the State. This probably is an emulation of the situation in England where salary and allowances of the members of the Parliament are not charged on the Consolidated Fund. As a necessary corollary, it would be a votable item.

There thus is a broad division of functions such as executive, legislative and judicial in our Constitution. The Legislature lays down the broad policy and has the power of purse. The Executive executes the policy and spends from the Consolidated Fund of the State what Legislature has sanctioned. The Legislative Assembly enacted the Act enabling to pay its members salary and allowances. And the members vote the grant and pay themselves. In this background even if there is an officer to disburse this payment or that a pay bill has to be drawn-up are not such factors being decisive of the matter. That is merely a mode of payment, but the MLAs by a vote retained the fund earmarked for purposes of disbursal for pay allowances payable to them under the relevant statute. Therefore, even though MLA receives pay and allowances he is not in the pay of the State Government because Legislature of a State cannot be comprehended in the expression 'State Government'.

This becomes further clear from the provision contained in Article 12 of the Constitution which provides that "for purposes of Part III, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". The expression 'Government and Legislature', two separate entities, are sought to be included in the expression 'State' which would mean that otherwise they are distinct and separate entities. This conclusion is further reinforced by the fact that the Executive sets up its own secretariat, while Article 187 provides for a secretarial staff of the Legislature under the control of the Speaker, whose terms and conditions of the service will be determined by the Legislature and not by the Executive.

## PRESIDENT OF INDIA

### SYNOPSIS

29.4. President of India.

29.4-a. Election of President.

29.4-h. Electoral College.

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- 29.19. Constitutional position of King in England.
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#### 29.4. *President of India.*

The Constitution provides that there shall be a President of India.<sup>1</sup>

##### 29.4-A. *Election of President.*

The President is elected by the members of an electoral college consistent of (a) the elected members of both Houses of Parliament ; and (b) the elected members of the Legislative Assemblies of the States.<sup>2</sup>

##### 29.4-B. *Electoral College.*

The words an electoral college consisting of in Article 54 mean that the electoral college shall consist of persons mentioned therein. The words consisting of refer to the strength of the electoral college. The Houses of Parliament and the Legislative Assemblies are mentioned (in Article 54) only for the purpose of showing the qualification of members of electoral college.<sup>3</sup>

The electoral college as mentioned in Article 54 is independent of the Legislatures mentioned in Art. 54. None of the Legislatures mentioned in Art. 54 has for the purpose of that Article any separate identity vis-a-vis the electoral college. The electoral college compendiously indicates a number of persons, holding the qualifications specified in the Article to constitute the electorate for the election of the President and to act as independent electors.<sup>4</sup>

The members of electoral college mentioned in Article 54 are not both Houses of Parliament and the Legislative Assemblies of the States. The essence as well as scope of Article 54 is merely to prescribe qualifications required for electors to elect President. The elected members of both Houses of Parliament and the Legislative Assemblies of States are the only members of the electoral college.<sup>5</sup>

1. *Constitution of India*, Art. 5.
2. *Ibid*, Art.
3. *In re Presidential Election*, 1974 SC 1682 (1588).
4. *Ibid*. 1688.
5. *Ibid.*, p. 1688.

The Constitution makers may well have visualised that all legislative bodies should be in existence at the time of the Presidential election and all elected members of such bodies should participate in that election. But that is only an ideal and is not practicable, because of the likely vacancies in the legislative bodies due to death, disqualification, resignation and the like.<sup>1</sup>

Dissolution of the Assembly means that there are no elected members of that dissolved Assembly. The electoral college is always ready to meet the situation at the expiry of the term of office or any vacancy caused by death, resignation or removal or otherwise. The elected members of a dissolved Legislative Assembly of a State are no longer members of the electoral college consisting of the elected members of both Houses of Parliament and elected members of the Legislative Assemblies of the States and are, therefore, not entitled to cast votes at the Presidential election.<sup>2</sup>

*In re Presidential Election*<sup>3</sup> it was contended that Article 54 reflected the democratic pattern of participation by the States in the choice of the President and if a State were denied such a right, it would be undemocratic. Recourse was taken to Article 368 to show that Articles 54 and 55 were mentioned in the proviso to Article 368 and if any amendment of Articles 54 and 55 were required consent of the states was necessary. It was therefore said that Articles 54 and 55 read with Article 368 would be a key to the interpretation of Article 62 that no election of the President could be held without the representation of elected members of Legislative Assemblies of the State where the Assembly has been dissolved.

Rejecting these contentions the Supreme Court said: "Article 54 lays down the qualifications for membership of the electoral college. The Gujarat State Assembly had been dissolved under Article 174. As a result of the dissolution, there were no elected members of the Legislative Assembly in a State. The electoral college consists of elected members of State Assemblies. If the Legislative Assembly of a State is dissolved, the members of that dissolved Legislative Assembly do not fulfil the character of elected members of a State Assembly. It will not only be undemocratic but also unconstitutional to deny the elected members of both the Houses of Parliament as well as the elected members of the Legislative Assemblies of the State the right to elect the President in accordance with the provisions of the Constitution only because the Assembly of a State is dissolved. The true meaning of Article 54 is that such persons as possess the qualification of being elected members of both Houses of Parliament and of Legislative Assemblies of States at the crucial time of the date of election will be eligible members of electoral college entitled to cast vote at the election to fill the vacancy caused by the expiration of the term of office of the President".<sup>4</sup>

If as a result of dissolution of a Legislative Assembly of a State there are no elected members of the Legislative Assembly of a State a State will not have any elected member of a State legislative Assembly to qualify for the Electoral College. It may be said on the analogy of the observations in the *Khare*<sup>5</sup> case that though vacancies in the electoral college by reason of the fact that there are no elected members of the Legislative Assembly of a State where

1. *In re Presidential Election*, 1974 SC 1612 (1688).

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*, p. 1689.

5. *N. B. Khare v. Election Commission*, 1957 SC 694.

the Legislative Assembly is dissolved. That matter will not be a ground for preventing the holding of the election at the expiry of the term of President or suggesting that the election to fill the vacancy caused by the expiry of the term of the office of the President could be held only after election to the Legislative Assembly of a State where the Legislative Assembly is dissolved is held.<sup>1</sup>

Under Article 54 only elected members of both Houses of Parliament and the Legislative Assemblies of the States are members of the electoral college. The numerical strength of the electoral college will be the total number of elected members of both Houses of Parliament and the Legislative Assemblies of the States. At any particular time there may not be the full strength of the electoral college. At the relevant date of the Presidential election if a person who was prior to that relevant date an elected member of the Houses of Parliament or of the Legislative Assemblies of the States and ceased to become an elected member of any of the legislative bodies by reason of death or resignation or disqualification or dissolution of the legislative body such a person would not possess the qualification to be an elector.

#### 29.5. *Manner of election of President—Constitutional Provisions.*

As far as practicable there shall be uniformity in the scale of representation of the different States at the election of the President.<sup>2</sup> For the purpose of securing such uniformity among the states interse as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner.<sup>2</sup>

(1) Every elected member of the Legislative Assembly of a State has as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly, and if, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-clause (a) shall be further increased by one.<sup>3</sup>

Each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clause (a) and (b) by the total number of the elected members of both Houses of Parliament, fractions exceeding one half being counted as one and other fractions being disregarded.<sup>4</sup>

The expression population means the population contained in the last preceding census of which the relevant figures have been published. The reference to the last preceding census of which the relevant figures have been published shall until the relevant figures for the first census taken after the year 2000 have been published, be construed as reference to 1971 census.<sup>6</sup>

The essence of Article 55 merely lies in the application of formulae whereby each elector having the required qualifications under Article 54 shall

1. In re *Presidential Election*, 1974 SC 1682 (1689).
2. *Constitution of India*, Art. 55 (1).
3. *Ibid.*, Art. 55 (2).
4. *Ibid.*, Art. 55 (2) (a) (b).
5. *Ibid.*, Art. 55 (2) (c).
6. *Ibid.*, Art. 55 Expl.

be entitled to exercise the number of votes in accordance with Article 55. Neither Article 54 nor Article 55 has anything to do either with the time of the election to fill the vacancy before the expiration of the term or to prevent the holding of the election before the expiration of the term by reason of dissolution of Legislative Assembly of a State.<sup>1</sup>

Neither Article 54 nor Article 55 prescribes the circumstances in which or the time when the election of the President shall take place. Article 55 has no concern with the competence of the election of the President because of the dissolution of the legislative Assembly of State. Article 55 (2) deals with the formulae for securing uniformity among the States inter se and parity between States as a whole and the Union. It is important to notice that parity is not between each State separately as a unit on the one hand and the Union on the other but between the States as a whole and the Union.<sup>2</sup>

Article 55 (1) states that as far as practicable, there shall be uniformity in the scale of representation. It is indisputable that the uniformity among the States inter se and parity between the States as a whole and the union which are contemplated in Article 55 (2) are not the same thing as uniformity in the scale of representation of the different States contemplated in Article 55 (1). The words "as far as practicable, in Art. 55 (1) in relation to uniformity in the scale of representation of the States are important. Article 55 (1) show that the words "as far as practicable" indicate that in practice the scale of representation may not be uniform because of the actual number of electors entitled at the date of election to cast their votes. The actual number of electors at the date of the election of the President may not be equal to the total number of all the elected members of both Houses of Parliament and all Legislative Assemblies of all States.<sup>3</sup>

Article 55 indicates the methods of calculating as to how many votes an elected member of the electoral college can cast at Presidential election. Article 55 has nothing to do with any vacancy in the electoral college as mentioned in Article 71 (4), or a cesser of membership of the electoral college by reason of a member not fulfilling the character of elected member of both Houses of Parliament or of Legislative Assemblies of States.<sup>4</sup>

### 29.6. Qualification for election as President.

No person shall be eligible for election as President unless he (a) is a citizen of India ; (b) has completed the age of thirty-five years, and (c) is qualified for election as a member of the House of the People.<sup>5</sup>

A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.<sup>6</sup> A person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or for any State.<sup>7</sup>

1. *In re Presidential Election*, 1974 SC 1682 (1688).

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*, p. 1688.

5. *Constitution of India*, Art. 58 (1).

6. *Ibid.*, Art. 58 (2).

7. *Ibid.*, Art. 58 (2) Expl.



The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.<sup>1</sup>

The President shall not hold any other office of profit.<sup>2</sup>

#### 29.7. *Emoluments of Presidents.*

The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.<sup>3</sup>

Under this Schedule his emoluments are Rs. 10000 per month. He is entitled throughout his term of office to the same privileges to which the Governor-General was entitled before the commencement of the Constitution.

The emolument and allowances of the President shall not be diminished during his term of office.<sup>4</sup>

#### 29.8. *President to take oath.*

Every President and every person acting as President or discharging the functions of the President shall before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the senior most Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say :

swear in the name of God

“I, A. B., do—————that I will faithfully execute  
solemnly affirm  
the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the constitution and the law and that I will devote myself to the service and well being of the people of India”.<sup>5</sup>

A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.<sup>6</sup>

#### 29.8-A. *Term of President*

The President shall hold office for a term of five years from the date on which he enters upon his office.<sup>7</sup>

1. *Constitution of India*, Art 59 (1).
2. *Ibid.*, Art. 59 (2).
3. *Ibid.*, Art. 59 (3).
4. *Ibid.*, Art. 59 (4).
5. *Ibid.*, Art. 60.
6. *Ibid.*, Art. 57.
7. *Ibid.*, Art. 56 (1).

**29.8-B. Resignation, Removal of President**

The President may by writing under his hand addressed to the Vice-President, resign his office. The resignation shall then forthwith be communicated by the Vice President to the Speaker of the House of the People.<sup>1</sup>

**29.9. Impeachment of President**

In the fourteenth century the House of Lords entertained accusations both against peers and against commoners when preferred by the commons. Such accusations came to be known as impeachments. There was long break from 1459 until this ancient weapon was refurbished for a new use in 1621; during the interval Parliaments were hardly in a position to impeach the King's Ministers for it was a check upon the Kings' Ministers that the impeachment was chiefly valuable and came to be afterwards valued, smaller offenders could be left to their fate in the ordinary courts.<sup>2</sup> There were a few cases in the Seventeenth Century, since the death of William III there have been but nine in the nineteenth century but one, that of Lord Melville in 1805. Maitland in his lectures on Constitutional History said: "It seems highly improbable that recourse will again be had to their ancient weapon unless we have a time of revolution before us. If a statesman has really committed a crime then he can be tried as like any other criminal, if he has been guilty of some misdoing that is not a crime, it seems far better that it should go unpunished than that new law should be invented for the occasions and that by a tribunal of politician and partisans; for such misdoing disgrace and loss of office are now a days sufficient punishments. Lastly a Modern House of Commons will hardly be brought to admit that in order to control the King's advisers it needs the aid of the House of Peers. However there the old weapon is an accusation by the commons of England at the bar of the House of Lord".<sup>3</sup> Before the full development of Ministerial responsibility impeachment was a useful weapon enabling the commons to call to account Ministers appointed by and responsible to the Crown.<sup>4</sup>

In a republican form of Government where a provision is made for the elective head of the State by the people the power to remove the head of the state also rest with the people and their representatives. Dignity requires that so long the head of the state is occupying the High Office he should not be prosecuted in the Municipal Courts or when the offensive conduct of the head of the state may not be such for which the ordinary law of the land may not afford due punishment. In these circumstances the Constitution of almost all the republican countries have taken recourse to this ancient weapon of impeachment.

The President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61 of the Constitution.

When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.<sup>5</sup> No such charge however shall be preferred unless (a) the proposal to prefer such charge is

1. *Constitution of India*, Art. 56 (a) and (2).
2. Maitland—*Constitutional History of England*, p. 215.
3. *Ibid.*, p. 477.
4. *Wade & Phillips : Constitutional Law*, p. 311.
5. *Constitution of India*, Art. 61 (1).

contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution,<sup>1</sup> (b) such resolution has been passed by a majority of not less than two-third of the total membership of the House.<sup>2</sup>

When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.<sup>3</sup> If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.<sup>4</sup>

#### 29.10. *Vacancy to be filled in.*

An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.<sup>5</sup>

An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy ; and the person elected to fill the vacancy shall, subject to the provisions of Article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.<sup>6</sup>

The word 'otherwise' does not refer to a vacancy caused by the expiration of the term of office for the obvious reason that the same is the subject matter of Article 62 (1). The marginal note to Article 62 fully bears this out. Further, a President whose term has expired can continue to hold the office only under Article 56 (1) (c) until his successor enters upon his office. Article 56 (1) (c) is complementary to Article 62 (1). Here successor means a successor elected before or even after the expiration of the term stated in Article 62 (1).

The word 'otherwise' may take in cases where for example, a President becomes disqualified to hold the office or where his election is declared void, and, therefore, he cannot hold the office. In such cases, an election is to be held not later than six months from the date of the occurrence of the vacancy.<sup>7</sup>

#### 29.11. *Term of office and election to fill vacancy.*

The term of office of the President is fixed. The election to fill the vacancy caused by the expiration of the term is to be completed before the expiration of the term. It is in that context that the outgoing President notwithstanding the expiration of the term continues to hold office under Article

1. *Constitution of India*, Art. 61 (2)

2. *Ibid.*,

3. *Ibid.*, Art. 61 (3).

4. *Ibid.*, Art. 61 (4).

5. *Ibid.*, Art. 62 (1).

6. *Ibid.*, Art. 62 (2).

7. *In re Presidential Election*, 1974 SC (1689).

56 (1) untill his successor enters upon his office. Here successor means a successor elected before or even after expiration of the term stated in Article 62 (1) and (2).<sup>1</sup>

The completion of election before the expiration of the term in the case of vacancy caused by the expiry of the term as well as filling the vacancy by holding an election not later than six months from the date of the occurrence of the vacancy in the other case does not contain any provision for extension of time. By way of contrast reference may be made to Article 83 where it is said that though the expiration of the period of five years shall operate as a dissolution of the house the period may, while a proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation has ceased to operate.<sup>2</sup>

This is a constitutional mandate that an election to fill a vacancy caused by the expiration by the term of office of President shall be completed before the expiry of the term, and other provisions like Articles 54, 55 subserve this Article. The Legislative Assemblies of the States are not members of the electoral college. None of the Articles 368, 54, 55 can rob Article 62 of its constitutional content. Article 62 stands by itself independent of any other provision.<sup>3</sup>

The Supreme Court laid down the following propositions :<sup>4</sup>

1. Only such persons who are elected members of both Houses of Parliament and the Legislative Assemblies of the States on the date of election to fill the vacancy caused by the expiration of the term of office of the President will be entitled to cast their votes at the election.

2. Subject to the aforesaid observation as to the effect of the dissolution of a substantial number of the Legislative Assemblies the vacancies caused by the dissolution of an Assembly or Assemblies will be covered by Article 71 (4).

3. The election to the office of the President must be held before the expiration of the term of the President notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved. The election to fill the vacancy in the office of the President is to be held and completed having regard to Articles 62 (1), 54, 55 and the Presidential and Vice-Presidential Elections Act, 1952.

4. Article 56 (1) (c) applies to a case where a successor as explained in the foregoing reasons has not entered on his office and only in such circumstances can a President whose term has expired continue.

In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.<sup>5</sup>

1. *In re Presidential Election*, 1974 SC 1682 (1685).

2. *Ibid.*, p. 1689.

3. *Ibid.*

4. *Ibid.*

5. *Constitution of India*, Art. 65 (1).

**29.12. Vice President to act as President.**

When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions as President until the date on which the President resumes his duties.<sup>1</sup>

The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging, the function of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.<sup>2</sup>

Article 65 (1) provides that where the office of the President by reason of his death, resignation or removal or otherwise becomes vacant, the Vice-President shall act as President until the date on which a new President elected to fill vacancy enters upon his office. Article 65 (1) is complementary to Article 62 (2). An election to fill a vacancy in the office of the President for the reasons mentioned in Article 62 (2) obviously does not attract Article 56 (1) (c). This is another reason which establishes that the word "otherwise" used in relation to vacancy in the office of the President under Article 62 (2) cannot cover the case of a vacancy in the office of the President by the expiration of the term. Vacancy under Article 62 (2) does not enable the President to continue in office.<sup>3</sup>

**29.13. Election Petition against election of President and Vice-President.**

Article 71 (1) confers jurisdiction and power on the Supreme Court to inquire into and decide "all doubts and disputes arising out of or in connection with the election of a President or a Vice-President".

In *N. B. Khare v. Election Commissioner*<sup>4</sup> the Supreme Court held that the word 'election' meant the entire process of election.

In exercise of powers conferred on Parliament by Art. 71 (3) the Parliament enacted Presidential and Vice-Presidential Election Act 13 of the 1952. The Supreme Court under Art. 145 of the Constitution has framed rules to regulate the procedure.

By Constitutional (Eleventh Amendment) Act, 1961 Clause (4) to Art. 71 was added and it was to the effect that the election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the member of the electoral college electing him.

**Challenge to President's election.**

Section 7 of Presidential and Vice-Presidential Election Act, 1952 states that if a candidate whose nomination has been made and is found to be in order on scrutiny, dies after the time fixed for nomination and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission and all proceedings with reference to the election shall be commenced a new in

1. Constitution of India, Art. 65 (2).

2. *Ibid.*, Art. 65 (3).

3. *In re Presidential Election*, 1974 SC 1685.

4. 1957 SC 694.

all respects as if for a new election. These provisions in Section 7 of the 1952 Act are to be considered along with Section 4 of the Act. Sub-section (3) of Section 4 states that in the case of an election to fill a vacancy caused by the expiration of the term of office of the President or Vice-President, the notification under sub-section (1) shall be issued on, or as soon as conveniently may be after, the sixtieth day before the expiration of the term of office of the outgoing President or Vice-President, as the case may be, and the dates shall be so appointed under the said sub-section that the election will be completed at such time as will enable the President or the Vice-President thereby elected to enter upon his office on the day following the expiration of the term of office of the outgoing President or Vice-President, as the case may be.<sup>1</sup>

If the completion of election before the expiration of the term is not possible because of the death of the proposed candidate it is apparent that election has commenced before the expiration of the term is rendered impossible by an act beyond the control of human agency.

The necessity for completing the election before the expiration of the term is enjoined by the constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.<sup>2</sup>

The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of the office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62 (1) of its mandatory character.<sup>3</sup>

#### **29.14. Discharge of President's functions in certain contingencies.**

In the event of the occurrence of vacancies in the offices of both President and the Vice-President, by reason in each case of death, resignation or removal, or otherwise, the Chief Justice of India or in his absence, the senior-most Judge of the Supreme Court of India available shall discharge the functions of the President until a new President is elected in accordance with the provisions of the Constitution to fill the vacancy in the office of the President enters upon his office or a new Vice-President so elected begins to act as President under Article 65 of the Constitution, whichever is earlier.

When the Vice-President, while discharging the functions of the President, dies, resigns, or is removed or otherwise ceases to hold office, the Chief Justice of India or, in his absence, the senior-most Judge referred to in sub-section (1) shall discharge the said functions until the President resumes his duties or a new Vice-President is elected as aforesaid, whichever is earlier.

When the Vice-President :

(a) while acting as President ; or

(b) while discharging the functions of the President, is unable to discharge the functions of the President owing to absence, illness or any other cause, the Chief Justice of India or, in his absence, the senior-most Judge referred to in sub-section (1) shall discharge the said functions—

(i) in the case referred to in clause (a), until a new President elected as aforesaid enters upon his office or until the Vice President acting as President assumes his duties, whichever is earlier;

1. *In re Presidential Election*, 1974 SC 1682 (1685).

2. *Ibid.*, p. 1686.

3. *Ibid.*

(ii) in the case referred to in clause (b), until the President resumes his duties, or the Vice-President resumes his duties, whichever is earlier.

The person discharging the functions of President under this section shall, during, and in respect of the period while he is so discharging the said functions, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by and, until provision in that behalf is so made, such emoluments, allowances and privileges are specified in the Second Schedule.

#### 29.15. *Pension to retiring President.*

(1) There shall be paid to every person who ceases to hold office as President, either by the expiration of his term of office or by resignation of his office, a pension of fifteen thousand rupees per annum for the remainder of his life ;

(2) Subject to any rules that may be made in this behalf, every such person shall, for the remainder of his life be entitled :

(a) to secretarial staff and office expenses, the total expenditure on which shall not exceed twelve-thousand rupees per annum; and

(b) to medical attendance and treatment free of charge.

(3) Where any such person is re-elected to the office of President, he shall not be entitled to any benefit under this section for the period during which he again holds that office.

Original Section 2 re-numbered as sub-section (1) thereof and the proviso to the section deleted therefrom by the President's Pension (Amendment) Act, 1962 (24 of 1962), Section 2 (28.6.1962).

Sub-sections (2) and (3) inserted, are (3) Pension to the last Governor-General—The provisions of Section 2 shall apply to the person who held office as the last Governor-General of India as they shall apply to any person who ceases to hold office as President.

(4.) Pension to be charged on the Consolidated Fund of India. Any (sum) payable under this Act shall be charged on the Consolidated Fund of India. Substituted for (Pension by Act 24 of 1962), section 3 (28-6-1962).

#### *President to appoint Ministers on advise of Prime Minister.*

In making appointments, a Prime Minister can use any of four criteria ; personal loyalty rewarding friends personal disloyalty bribing enemies) representativeness and departmental competence.

Constitutionally, a cabinet decision takes precedence over the decision of an individual Minister, including the Prime Minister. A Prime Minister does not want to be open to attack from within the party. Unlike the American President, a Prime Minister is bound to the Cabinet just as much as any other member. To take a position in advance of agreement in the Cabinet and then to find oneself in a minority is to risk loss of office. When Harold Wilson did just this, in a Labour Government dispute on industrial relation legislation in 1969, he had to abandon his policy rather than risk government from Downing Street.<sup>2</sup>

1. *Presidential Pension Act, 1952* Sections 2, 3.

2. *President and Prime Minister*, p. 25.

**29.16. Role of President.**

The role of a President differs radically according to the nature of the political system. A President's power can approach those of an imperial ruler only in an autocracy, that is, a system that so values the authority of government that suppresses the representation of particular interests by competing political parties and pressure groups. By contrast, a President is almost a bystander in a system of government that so values the representation of particular demands that it provides hardly any institution to make collective decisions.<sup>1</sup>

Contemporary European and American political systems have contrasting histories. European governments have evolved a political culture that emphasize a unitary corporate will, whether it be known as the Crown in England, the State in France or the Nation (Folk) in Germany, Italy. An e'l-a-tiste tradition offers values justifying a government strong enough in its collective authority to make collective decisions. This tradition also justified the suppression of politics, that is, the legitimate articulation of popular demands.<sup>2</sup>

Making the authority of government responsive to popular demands began in the seventeenth century in England a century later on the continent of Europe with the French Revolution. Resting government on popular consent as well as authority took centuries to secure. In Germany and Italy contemporary institutions of representative government have only been developed since World War II.

In comparative perspective, the American system stands out because it maximizes politics. The institutions of government incorporate the representation of popular demands into the very structure of government. The Founding Fathers, described the American system of governance as a system of checks and balances. The checks are easy to see. The opposition of Congress and the President, the independent powers of the courts, Washington need to cooperate with States in the federal system. The prohibition of government activity is contained in the Bill of Rights. The balances are more difficult to discern. No where is there a single institution to declare the will of the government as a whole. If any institution can claim this status, it is the Presidency, for only the President is elected by the nation as a whole. But neither Congress nor history justify such a claim. The American government is a system of institutionalised checks, the balance is meant to result from those checks harmonizes in a more or less coherent whole.<sup>3</sup>

**29.17. Position of President under the Constitution.**

Our constitution embodies generally the Cabinet system of the Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the constitution on the aid and advice of his Council of Ministers. Art. 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President will act only according to the opinion of the Election Commission.

The Constituent Assembly had to reconcile the position of an elected President with an elected legislature, and in doing so, they adopted more or

1. *President and Prime Minister*, p. 287.

2. *Ibid.*, p. 288

3. *Ibid.*, p. 289.



less, the position of the British monarch for the President. His position is that of a Constitutional President. The Ministers are, of course, responsible to the Legislature and tender advice to the President, who is bound to act according to that advice. Although there was no specific provision in the Constitution itself making it binding on the President to accept the advice of his Ministers, it hoped that the convention under which, in England the King acted always on the advice of his Ministers would be established in this country also and the President not so much on account of the written word in the Constitution, but as a result of this healthy convention, would become a constitutional President in all matters".

Though the executive power is technically vested in the President<sup>1</sup> just as the same is vested in the Crown in England. Under Article 74 of the Constitution a Council of Ministers<sup>2</sup> with the Prime Minister as the head has to aid and advise the President in the exercise of his functions. Article 74 is all-pervasive in its character and does not make any distinction between one kind of function and another. It applies to every function and power vested in the President. Whether it relates to addressing the House or returning a Bill for reconsideration or assenting or withholding assent to the Bill. It will be constitutionally improper for the President not to seek to be guided by the advice of his Ministers in exercising any of the functions legally or technically vested in the President. The expression "aid and advise" in Article 74 can not be construed so as to enable the President to act independently or against the advice of the Cabinet."

"Every Constitutional monarch" observed Lord Esher "while advising George V possess a dual personality. He may hold and express opinions upon the conduct of his Ministers and their measures. He may endeavour to influence their actions. He may delay decisions in order to give more time for reflection. He may refuse assent to their advice up to the point where he is obliged to choose between accepting it and losing their services. If the Sovereign believes advice to him to be wrong, he may refuse to take it, and if his Minister yields, the Sovereign is justified. If the Minister persists, feeling that he has behind him a majority of the people's representatives, a constitutional monarch must give way. What then is the King to do, if he is asked by his Minister to violate the constitution? The answer is that the Sovereign can not act unconstitutionally so long as he acts on the advice of the Minister supported by a majority in the House of Commons. Ministerial responsibility is the safeguard of the Monarchy. What, however, is the King to do if he is asked to support his Ministers in putting a strain upon the constitution which in his view is improper and dangerous to the welfare of the state? In the last resort the King has no option. If the constitutional doctrine of ministerial responsibility mean any thing at all, the King would have to sign his own death-warrant, if it was presented to him for signature by a Minister commanding majority in Parliament. If there is any tampering with this fundamental principle, the end of the monarchy is in sight."<sup>3</sup>

In *Shamsher Singh v. State of Punjab*,<sup>3</sup> Mr. Justice Krishna Iyer declared the law on this branch of our constitution to be that the President and Governor, custodian of all executive and other powers under various Articles shall, by virtue of these provisions exercise their formal constitutional powers only

1. *Constitution of India*, Art. 63.

2. *Advice tendered during the dispute over Irish Home Rule in 1913.*

3. 1974 SC 2192 : (1974) 2 SCC 831.

A. *Ibid.* \*

upon and in accordance with the advice of their Ministers save a few well known exceptional situations”.

The President or the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of powers and duties. But the conduct of the President may be brought under those review by court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Art. 61. This protection does not however restrict the right of any person to bring appropriate proceedings against the Government of India.<sup>1</sup>

No criminal proceedings whatsoever shall be instituted or continued against the President in any court during his term of office, and no process for his arrest or imprisonment shall issue from any court during his term of office.

No civil proceedings in which relief is claimed against the President, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, until the expiration of two months next after notice in writing has been delivered to the President or left at his office, stating the nature of the proceedings, the cause of act therefore, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

The Supreme Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the King under the British Parliamentary system.<sup>2</sup>

It is, therefore, necessary to know what exactly is the position of the King of England as head of the constitutional monarchy. This has been best described by Nicholson in his biography of George V.

### 29.18A-. *Pardoning Power of President and Governor.*

The effect of a pardon or what is sometimes called a free pardon is to clear the person from all infamy and from all statutory or other disqualifications following upon conviction. It makes him as it were a new man.<sup>3</sup>

But the same effect does not follow on a mere remission which stands on a different footing altogether. In the first place, an order of remission does not wipe out the offence, it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a Court, he need not, do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the Court it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the Court, though the order of conviction and sentence passed by the Court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have a reducing the sentence passed by the trial court and substituting in its place the reduced

1. *Constitution of India*, Art. 361.

2. *Samsher Singh v. State of Punjab*, 1974 SC 2192 (2199); *Ram Jawaya Kapur v. State of Punjab*, 1955 SC 549 (556); *A Sanjivi Naidu v. State of Madras*, 1970 SC 1102 (1106); *U. N. Rao v. Indira Gandhi*, 1971 SC 1002.

3. *Sarat Chandra v. Khagendranath*, 1961 SC 334 (336); (1961) 2 SCR 133.

sentence<sup>1</sup> adjudged by the appellate or revisional court. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it *qua* judgment.

Under the constitution the power to grant pardon etc. is vested in the President and the Governor of States. Art. 72 deals with the former and Art. 161 with the latter. Art. 72 provides that the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence (1) in all cases where the punishment or sentence is by a Court Martial ; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends that is to the matters with respect to which Parliament has power to make laws; (c) in all cases, where the sentence is a sentence of death.<sup>1</sup> This power of the President does not effect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute sentence passed by a Court Martial.<sup>2</sup> Similarly it also does not affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.<sup>3</sup> Under Art. 161 the Governor of State has the power to grant pardons, reprieves, respites, or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends that is in respect of matters with respect to which the Legislature of the State has power to make law.<sup>4</sup>

Both Articles 72 and 161 give the widest powers to the President or the Governor of a State as the case may be and there are no words of limitation indicated in either of the two Articles. Though Art. 161 does not make any reference to Art. 72, the power of the Governor of a State to grant pardon etc. to some extent overlaps the same power of the President particularly in the case of a sentence of death.

Nanavati was arrested in connection with a charge of murder. The High Court convicted the petitioner under Section 302 of the Indian Penal Code and sentenced him to imprisonment for life. On the same day the Governor in the exercise of his powers under Article 161 of the Constitution suspended the sentence passed by the High Court till the appeal intended to be filed by Nanavati in the Supreme Court against his conviction. A petition was filed in the Supreme Court against the order of the High Court and an application was made that the petitioner may be exempted surrendering under order 21 rule 5 of the Supreme Court Rules. This Rule provided that "when petitioner had been sentenced to an imprisonment, the petition shall state whether the petitioner had surrendered and unless the Court otherwise orders petition shall not be listed for hearing untill the petitioner had surrendered. The main question that fell for decision in *Nanavati v. State of Bombay*<sup>5</sup> was whether the suspension passed by the Governor under Art. 161 could operate when the Supreme Court had been moved for granting special leave to appeal from the judgment of the High Court. It was argued that there could never be a conflict between the exercise of the power by the Governor under Article

1. *Constitution of India*, Art. 72 (1).

2. *Ibid.*, Art. 72 (2).

3. *Ibid.*, Art. 72 (3)

4. *Ibid.*, Art. 161.

5. 1961 SC 112.

161 and by the Supreme Court under Article 142 because the power under Art. 161 was executive power and the power under Article 142 was judicial power and the two did not act in the same field. Rejecting this contention Sinha, C. J. observed :

“The field in which the power is exercised does not depend upon the authority exercising the power but upon the subject-matter. What the power which is being exercised in this case? The power is being exercised by the executive to suspend the sentence : that power can be exercised by the Supreme Court under Art. 142. The field in which the power is being exercised is also the same namely the suspension of the sentence passed upon a convicted person. It is significant that the Governor's power has been exercised in the present case by reference to the appeal which the petitioner intended to file in this Court. There can therefore be no doubt that the judicial power under Art. 142 and the executive power under Art. 161 can within certain narrow limits be exercised in the same field. The question that immediately arises is one of harmonious construction of two provisions the Constitution as subject to the other by specific words in the constitution itself. As already pointed out, Art. 161 contains no words of limitation ; in the same way, Art. 142 contains no words of limitation and in the fields covered by them they are unfettered. But if there is any field which is common to both, the principle of harmonious construction will have to be adopted in order to avoid conflict between the two powers. It will be seen that the ambit of Art. 161 is very much wider and it is only in a very narrow field that the power contained in Art. 161 is also contained in Art. 142 namely, the power of suspension of sentence during the period when the matter is sub-judice in the Court. Therefore on the principle of harmonious construction and to avoid a conflict between the two powers it must be held that Art. 161 does not deal with the suspension of sentence during the time that Art. 142 is in operation and the matter is sub-judice in the Court.”<sup>1</sup>

### 29.19. *Constitutional position of the King in England.*

‘Kings’ announced James I, in 1609 ‘are justly called Gods because they exercise a manner of resemblance to Divine power on earth.....They have power to exact low things and abase high things and to make of their subjects like men at chess. This doctrine of Divine right did not survive the execution of Charles I.

The political aptitudes of the British people, their congenital dislike of all logical extremes, enabled them in the course of centuries to develop a system which, without any rupture of continuity, was sufficiently elastic to admit of recurrent change. They called this system ‘limited’ or ‘constitutional’ Monarchy. In perfecting this instrument they were much assisted by the accidents of history.<sup>2</sup>

The Bill of Rights established the firm principle that the King reigned, not by divine right but solely with and by the consent of Parliament.<sup>3</sup>

The Act of Settlement of 1701, contained one all-important addition to the Bill of Rights. It was then laid down that in future Ministers should be ‘responsible’ for the acts of the sovereign.

1 *K. M. Nanavati v. State of Bombay*, 1961 SC 112 (122).

2 Harold Nicholson : *George V*, p. 109.

3 *Ibid.*, p. 110.

The expression 'responsible government' which thereafter became current, includes several different implications. In the first place, it means that Ministers are 'responsible' to Parliament in the sense that they cannot govern without support of a majority in the House of Commons. In the second place, it means that Ministers are 'responsible' for the 'advice' they tender to the Sovereign and therefore for any action which he may take.<sup>1</sup>

A subsequent extension of the phrase implies what is known as 'collective responsibility' or 'Cabinet responsibility,' namely the joint responsibility of Ministers for each other's actions and misfortunes. The King, under principle, cannot dismiss an individual Minister without incurring the resignation of the Cabinet as a whole. Apart from these constitutional, or institutional implications the phrase 'responsible government' contains a metaphysical idea. Not only Ministers, but the official opposition also, must be guided in their actions and statements by a sense of responsibility irresponsible acts or utterances should be regarded as obnoxious to the spirit of the constitution.<sup>2</sup>

"The King", stated Lord Erskine in the House of Lords on April 13, 1807, 'can perform no act of government himself. No act of state or government can be the King's; he cannot act but by advice; and he who holds office sanctions what is done, from whatsoever source it may proceed.'<sup>3</sup>

In Foreign Affairs the King can act only upon the advice of his Foreign Secretary; in commonwealth affairs he, or his representative, can act only on the advice of a Dominion Government.

Sir William Anson has summarised as follows: 'The Sovereign does not constitutionally take independent action in foreign affairs; everything which passes between him and foreign princes or ministers should be known to his own ministers, who are responsible to the people for policy, and to the law for acts done.'

If the King, whether in internal or external affairs, can commit no public act except upon the advice of the Government in office, the question may be asked how his personal responsibility can ever, in any circumstances, become involved. The phrase 'the King can do no wrong' means, not that the monarch is infallible, but that, since he can do nothing without the advice of ministers, it is they who are personally responsible if mistakes are made. Can any public issue arise therefore in which the King has to exercise personal initiative or reach an independent decision?<sup>4</sup>

The discussion of this question has sometimes been blurred by the fact that there exist certain functions which, in constitutional theory, the King alone can perform. No one but the King can summon, prorogue or dissolve Parliament. No one but the King can dismiss or appoint a Prime Minister. No one but the King grants pardons or confer peerages and honours. And no Bill, until it has received the Royal Assent, can become the law of the land. These powers are however limited in practice by the over-riding principle of 'responsible government'. The King is in fact accustomed to follow the advice tendered to him by the Prime Minister of the day, since, if he rejects that advice, the Government will resign, a general election will follow, the Crown may become involved in party controversy and the King may

1. Harold Nicholson : *George V*, p. 110.

2. *Ibid.*, p. 111.

3. *Ibid.*, p. 110.

4. *Ibid.*, p. 114.]

discover (as Willaim IV discovered to his cost) that the opinion of the country is against him. These are dangers which no constitutional Monarch should be expected to incur.<sup>1</sup>

The same considerations apply to the undoubted constitutional right possessed by the King to dismiss his Ministers. Unless an alternative Government, able to secure the confidence of the existing House of Commons were immediately available, then again a general election would ensue and the King's action might be exposed to public criticism.

To take a more extreme instance of the distinction between theory and practice, the King could constitutionally refuse the Royal Assent to a Bill which has passed through Parliament. Were he to do so, the clerk at the table of the House of Lords would substitute for the accustomed formula: 'Le Roy le veult' the unwanted words: 'Le RoyS' avisera'. This staring phrase has not been heard in the gilded Chamber for more than two hundred years. Mr. Asquith, therefore, had some justification for assuring the House of Commons in 1910 that the Royal Veto, which had not been exercised since 1707, was 'literally as dead as Queen Anne.'<sup>2</sup>

Thus the only 'independent' function which the King can properly be called upon to perform arises upon the death or resignation of a Prime Minister. The King is then expected to choose, or 'send for' his successor. His choice is of course limited by the fact that the new Prime Minister must command the support of his own party and the confidence of the House of Commons. But it certainly rests with the King, when alternative candidates, each possessing these qualifications, are available, to summon the one whom he regards as best fitted to carry on the Government. King George exercised this discretionary power when in 1923 he chose Mr Stanley Baldwin rather than Lord Curzon. He again exercised it when, in different circumstances, he charged Mr. Ramsay Mac Donald with the formation of a 'National Government' in 1931.

It would be agreed therefore by most constitutional authorities that the discretionary powers possessed by the King are in normal conditions strictly limited to the choice of a Prime Minister from among two or more equally acceptable candidates. Yet the perplexities which assailed King George during the first four years of his reign arose from the fact that the conditions then created were, in the opinion of many responsible people, not normal but abnormal.<sup>3</sup>

Although the executive power of the King are expressly limited by constitutional theory and by political expediency and practice the influence which he retains although indefinable is very great. It has been excellently described by Sir William Anson: "The real influence of the Sovereign in this country is not to be estimated either by his legal or his actual powers as the executive of the State. The King or Queen for the time being is not a mere piece of mechanism, but a human being carefully trained under circumstances which afford exceptional chances of learning the business of politics. Such a personage cannot be treated or regarded as a mere instrument: it is evident that on all matters of state, especially on matters which concern the relations of our own with other States, he receives full information, and is able to express if not to enforce an opinion. And this opinion may, in the course of a long reign, become a thing of great weight and value. It is impossible to be constantly

1. Harold Nicholson : *George V*, p. 115.

2. *Ibid*, p. 116-17.

3. *Ibid*, p. 116-117.

consulted and concerned for years together in matters of great moment without acquiring experience if not wisdom. Ministers come and go, and the policy of one group of ministers may not be the policy of the next, but all ministers in turn must explain their policy to the Executive Sovereign, must effect it through his instrumentality, must leave upon his mind such a recollection of its method and of its results as may be used to form and influence the action of their successors.<sup>1</sup>

The convention that it is the King, and not Parliament, who declares war and makes peace, who concludes treaties and who alone can cede territory, has encouraged the idea that in external affairs, whether foreign or imperial, he possesses wider constitutional powers both of initiative and action. Foreign policy, it has been argued, is continuous and above party. The King, as representing the nation as a whole, should therefore in international relations be less dependent upon the advice given to him by those Ministers who at the moment happen to command the confidence of the House of Commons. It has similarly been contended that in Commonwealth affairs the King (in that he stands in a unique relation to the several Dominion Governments) possesses a greater latitude of personal action. Each of these theories is fallacious.<sup>2</sup>

The Monarch, above all, is neutral. Whatever may be his personal prejudices or affections, he is bound to remain detached from all political parties and to preserve in his own person the equilibrium of the realm. An elected President—whether, as under some constitutions, he be no more than a representative functionary, or whether, as under other constitutions, he be the chief executive—can never inspire the same sense of absolute neutrality. However impartial he may strive to become, he must always remain the prisoner of his own partisan past; he is accompanied by friends and supporters whom he may seek to reward, or faced by former antagonists who will regard him with distrust. He cannot, to an equal extent serve as the fly-wheel of the state.<sup>3</sup>

Up till December 1916 King George had received a regular letter from the Prime Minister describing the opinions and decisions of each Cabinet. After the Cabinet secretariat began work he was sent a copy of the minutes. The Prime Minister had regular audiences and the Secretaries of State for Foreign Affairs 'or for war called when any special matters arose which they felt they ought to convey in person. Normally the King never wrote to the Cabinet.<sup>4</sup>

King George was quite clear about his own position. He was entitled to full information and could, if he felt it was necessary, express his views bluntly and strongly, but there was never any question of denying the politicians' right to make the ultimate decisions.<sup>5</sup>

The President in India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described as, "the right to be consulted, to warn and encourage." Indeed, Article 78 wisely used, keeps President in close touch with the Prime Minister on matters of national importance and policy significance, and there is no doubt that the imprint of his

1. Harold Nicholson : *George V*, p. 120.

2. *Ibid.*, p. 113.

3. *Ibid.*, p. 108.

4. Mackintosh : *The British Cabinet*, p. 401.

5. *Ibid.*, p. 402.

personality may chasten and correct the political Government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors, i.e., the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticised but actually vested with a pervasive and persuasive role. Political theorists are quite conversant with the dynamic role of the Crown which keeps away from politics and power and yet influences both. While he plays such a role, he is not a rival centre of power in any sense and must abide by and act on the advice tendered by his Ministers except in a narrow territory which is sometimes slippery.

The President, under the Indian Constitution, is not merely a figure head. Like the King of England, he will still have the right "to be consulted, to encourage and to warn". Acting on Ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers-in-Council if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice. It has been observed that the influence of the Crown—and of the House of Lords as well—in England has grown with every curtailment of its legal powers by convention or statute. A similar result is likely to follow in India too; for, as has been well said, "the voice of reason is more readily heard when it can persuade but no longer coerce". One can conceive of no better future for the President of India than that he should be more and more like the Monarch in England, "eschewing legal power, standing outside the clash of parties and gaining in moral authority". These words of constitutional wisdom come from one who played a key role in shaping the framework of the Republic and had no political affiliations.<sup>2</sup>

#### 29.20. *American President and British Prime Minister.*

Put simply, the American President, elected directly and separately, is virtually secure from all possible removal. Nevertheless, part or even the whole of his tenure may be frustrated by inability to get his legislation, including vital tax and other financial legislation, through a hostile Congress. He is not all that sure of success in a Congress reflecting a majority from his own party.

The Prime Minister, however, lives far more dangerously in that he can be ousted from office at very short notice if he loses control of Parliament. Nevertheless, since he exists only because of the confidence of Parliament, he has a much greater assurance that while confidence persists he can get his legislation, or most of it, carried through to the Statute Book.<sup>3</sup>

## VICE-PRESIDENT OF INDIA

### SYNOPSIS

#### 29.21. Vice-President.

#### 29.21. Election of Vice-President.

#### 29.22. Qualifications of Vice-President.

#### 29.23. Term of office.

#### Oath of Office.

#### (a) Functions and emolument of Vice-President.

#### (b) Effect of election declared void.

1. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2224).

2. *Ibid.* p. 2219.

3. *Wilson : Governance of Britain*, p. 169.



29.22. *Vice President*

The Constitution provides that there shall be a Vice-President of India.<sup>1</sup>

29.23. *Election of Vice-President*

The Vice-President is elected by the members of an electoral college consisting of the members of both Houses of Parliament in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election is by secret ballot.<sup>2</sup>

The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.<sup>3</sup>

29.23A. *Qualification of Vice-President.*

No person shall be eligible for election as Vice-President unless he (a) is a citizen of India ; (b) has completed the age of thirty-five years ; (c) is qualified for election as a member of the Council of States.<sup>4</sup> A person shall not be eligible for election as Vice President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.<sup>5</sup>

A person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or for any State.<sup>6</sup>

29.24. *Term of Office.*

The Vice-President shall hold office for a term of five years from the date on which he enters upon office. But a Vice-President may, by writing under his hand addressed to the President, resign his office.<sup>7</sup>

(b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then member, of the Council and agreed to by the House of the People ; but no such resolution shall be moved unless at least fourteen day's notice had been given of the intention to move the resolution.<sup>8</sup>

A Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.<sup>9</sup>

Art. 68 provides for the time of holding election to fill vacancy in the office of Vice-President and for the term of office of person elected to fill casual vacancy.—(1) An election to fill a vacancy caused by the expiration of the term

1. *Constitution of India*, Art. 63.

2. *Ibid.*, Art. 66 (1).

3. *Ibid.*, Art. 66 (2).

4. *Ibid.*, Art. 66 (3).

5. *Ibid.*, Art. 66 (4).

6. *Ibid.*, Art. 66 (4) Expla.

7. *Ibid.*, Art., 67 (a).

8. *Ibid.*, Art. 67 (b).

9. *Ibid.*, Art. 67 (c).

of office of Vice-President shall be completed before the expiration of the term.<sup>1</sup>

An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person elected to fill the vacancy shall, be entitled to hold office for the full term of five years from the date on which he entered upon his office.<sup>2</sup>

#### 29.24-A. Oath of office.

Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him an oath or affirmation in the following form, that is to say—

swear in the name of God

“I, A. B, do—————-that I will bear true faith and solemnly affirm

allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.”<sup>3</sup>

#### 29.24-B. Functions and emoluments of Vice-President.

The Vice-President is the ex-officio Chairman of the Council of States and shall not hold any other office of profit. During any period when the Vice-President acts as President or discharges the functions of the President under Article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under Article 97.<sup>4</sup>

In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.<sup>5</sup>

When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.<sup>6</sup>

The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of President, have all the powers and immunities of the President and be entitled to such emolument, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.<sup>7</sup>

Parliament may make such provisions as it thinks fit for the discharge of the functions for the President in any contingency not provided for in this Chapter.<sup>8</sup>

Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President

1. *Constitution of India*, Art. 68 (1).

2. *Ibid.*, Art. 68 (2).

3. *Ibid.*, Art. 69.

4. *Ibid.* Art. 64 (Proviso).

5. *Ibid.*, Art. 65 (1).

6. *Ibid.*, Art. 65 (2).

7. *Ibid.*, Art. 65 (3).

8. *Ibid.*, Art. 70.

or Vice<sup>2</sup> President, including the grounds on which such election may be questioned.<sup>1</sup>

The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him.

All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.<sup>3</sup>

The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.<sup>3</sup>

If the election of a person as President or Vice-President is declared void under any such law as is referred to in clause (1) acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.<sup>4</sup>

Allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule shall be admissible.

Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.

#### 29.24-C. *Effect of election declared void.*

If the election of a person as President or Vice-President is declared void by the Supreme Court for the acts done by him in the exercise and performance of the powers and duties of the office of President or Vice-President, as the case may be, on or before the date of the decision of the Supreme Court shall not be invalidated by reason of that declaration.<sup>5</sup>

The election of a person as President or Vice President shall not called in question on the ground of existence of vacancy for whatever reason among the members of the electoral college electing him.

In view of the constitutional declaration or exposition of Article 71(4) it is manifest that the language is of wide amplitude, viz, existence of any vacancy for any reason whatever among the members of the electoral college. It will take in any case where a person who as an elected member of the Houses of Parliament or the Legislative Assembly of a State became entitled to be a member of the electoral college but ceased to be an elected member at the relevant date of the election and therefore became disentitled to cast vote at the election and that vacancy among members of the electoral electoral was not filled up.<sup>6</sup>

1. *Constitution of India*, Art. 71 (1).

2. *Ibid.*, Art. 71 (2).

3. *Ibid.*, Art. 71 (3).

4. *Ibid.*, Art. 71 (4).

5. *Ibid.*, Art. 71 (1).

6. *Ibid.*, Art. 71 (4).

7. *Ibid.*, Art. 70 (1).

8. *In re Presidential Election*, 1974 3C 1682 (1690).

## THE GOVERNOR

**29.25. Governor.**

**29.25-A. Appointment of Governor.**

**29.25-B. Term of office, qualifications for appointment.**

**29.25-C. Functions of Governor**

**29.25. Governor a component part of Legislature.**

**29.26. Powers of Governor**

**29.27. Office of Governor---whether employment.**

**29.28. Governor whether acts in his discretion.**

### **29.25. Governor.**

The Constitution provides for a Governor for each State. The same person may be appointed as Governor for two or more States.

#### **29.25-A. Appointment of Governor.**

The Governor of a State shall be appointed by the President by warrant under his hand and seal.<sup>1</sup> and holds office during the pleasure of the President.<sup>2</sup>

#### **29.25-B. Terms of office and qualifications for appointment.**

Generally a Governor is appointed to hold office for a term of five years from the date on which he enters upon his office. He notwithstanding the expiration of his term, would continue to hold office until his successor enters upon his office.<sup>3</sup>

The Governor may, by writing under his hand addressed to the President, resign his office.<sup>4</sup>

No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.<sup>5</sup>

The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.<sup>6</sup>

The Governor shall not hold any other office of profit.<sup>7</sup> He shall be entitled without payment of rent to the use of his official residences and shall

1, *Constitution of India*, Art. 153, Proviso.

2. *Ibid*, Art. 155.

3. *Ibid*, Art. 156 (1).

4. *Ibid.*, Art. 156 (3).

5. *Ibid.*, Art. 156 (2).

6. *Ibid.*, Art. 157.

7. *Ibid.*, Art. 158 (1).

8. *Ibid.*, Art. 158 (2).

be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.<sup>1</sup> Where the same person is appointed as Governor of two or more States, the emoluments and allowances payable to the Governor shall be allocated among the States in such proportion as the President may by order determine.<sup>2</sup> The emoluments and allowances of the Governor shall not be diminished during his term of office.<sup>3</sup>

#### *Oath of office.*

Every Governor and every person discharging the functions of the Governor, shall before entering upon his office is required to make and subscribe in the presence of the Chief justice of the High Court exercising jurisdiction in relation to the State, or, in his absence, the senior-most Judge of that Court available an oath or affirmation in the following form, that is to say—

swear in the name of God

‘I, A B, do ————— that I will faithfully execute the solemnly affirm

office of Governor (or discharge the functions of the Governor) of..... (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well being of the people of —(name of the State)’.<sup>4</sup>

#### *21.55-C. Functions of a Governor.*

The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter.<sup>5</sup>

#### *29.25. Governor a component part of Legislature.*

Though it is true that the ‘Legislature’ of State includes the Governor and that a bill passed by such Legislature cannot become a law until it receives the Governor’s assent, the term ‘legislature’ is not always used in the Constitution as including the Governor, though Article 168 makes him a component part of the State Legislature. In Article 173, for instance, the word is clearly used in the sense of the ‘Houses of Legislatures’ and excludes the Governor. There are other provisions also where the word is used in context which exclude the Governor. Similarly the word ‘law’ is sometimes loosely used in referring to a bill. Article 31 (4), for instance, speaks of a ‘bill’ being reserved for the President’s assent ‘after it has been passed’ by the ‘legislature of a State’ and of ‘the law so assented to’. If the expression ‘passed by the legislature’ were taken to mean ‘passed by the Houses of the legislature and assented to by the Governor’...then, it would cease to be a ‘bill’ and could not longer be reserved as such. Nor is the phrase ‘law so assented’ strictly accurate, as the previous portion of the clause makes it clear that what is reserved for the President’s assent and what he assents to is a ‘bill’ and not a law’.<sup>6</sup>

#### *29.26. Governor’s Powers. :*

The Governor is a constitutional head of the State Executive, and has therefore to act on the advice of a Council of Ministers under Article 163. The

1. *Constitution of India*, Art. 158 (3).

2. *Ibid.*, Art. 158 (3-A).

3. *Ibid.*, Art. 158 (4).

4. *Ibid.*, Art. 159.

5. *Ibid.*, Art. 160.

6. *Union of India v. Basavalah* 1979 SC 1415 (1421)

Governor is, however, made a component part of the State Legislature under Article 164, just as the President is a part of Parliament. The Governor has a right of addressing and sending messages to under Articles 175 and 176, and of summoning proroguing and dissolving under Article 174, the State Legislature, just as the President has in relation to Parliament. He also has a similar power of causing to be laid before the State Legislature the annual financial statement under Article 202 (1), and of making demands for grants and recommending 'Money Bills' under Article 207 (1). In all these matters the Governor as the Constitutional head of the State is bound by the advice of the Council of Ministers.<sup>1</sup>

The Governor is, however, made a component part of legislature of a State under Art. 168 because every Bill passed by the State Legislature has to be reserved for the assent under Article 200. Under that Article, the Governor can adopt one of the three courses, namely, (i) he may give his assent to it, in which case the Bill becomes a law; or (ii) he may except in the case of a 'Money Bill' withhold his assent therefrom, in which case the Bill falls through unless the procedure indicated in the first proviso is followed, i. e., return the Bill to the Assembly for reconsideration with a message, or (iii) he may (subject to Ministerial advice) reserve the Bill for the consideration of the President, in which case the President will adopt the procedure laid down in Article 201. The first proviso to Article 200 deals with a situation where the Governor is bound to give his assent when the Bill is reconsidered and passed by the Assembly. The second proviso to that Article makes the reservation for consideration of the President obligatory where the Bill would, if it became law derogate from the powers of the High Court. Thus, it is clear that a Bill passed by a State Assembly may become law if the Governor gives his assent to it, or if, having been reserved by the Governor for the consideration of the President it is assented to by the President. The Governor is, therefore, one of the three components of a State legislature. The only other legislative function of the Governor is that of promulgating Ordinances under Article 213 (1) when both the Houses of the State legislature or the Legislative Assembly, where the legislature is unicameral are not in session. The Ordinance making power of the Governor is similar to that of the President, and it is co-extensive with the legislative powers of the State legislature.<sup>2</sup>

From an enumeration of the powers, functions and duties of the Governor, it is quite clear that he cannot, in the very nature of things, participate in the proceedings of the House or Houses of Legislature, while the State legislature passes a resolution in terms of Art. 252 (1), not being a member of the legislature under Art. 158.<sup>3</sup>

The function assigned to the Governor under Article 176 (1) of the addressing the House or Houses of Legislature, at the commencement of the first session of each year, is strictly not a legislative function but the object of this address is to acquaint the members of the Houses with the policies and programmes of the Government. It is really a policy statement prepared by the Council of Ministers which the Governor has to read out. Then again, the right of the Governor to send messages to the House or Houses of the Legislature under Article 175 (2) with respect to a Bill then pending in the legislature or otherwise, normally arises when the Governor withholds his assent to a Bill under Article 200, or when the President, for whose consideration a Bill is reserved for assent, returns the Bill withholding his assent. As already stated, a 'Bill' is something quite different from a 'resolution of House' and,

1. *Union of India v. Basavalah*, 1979 SC 1415 (1422).

2. *Ibid.*, p. 1423.

3. *Union of India v. Basavalaish*, 1979 SC 1415 (1422-23).

therefore, there is no question of the Governor sending any message under Article 175 (2) with regard to a resolution pending before the House or Houses of the Legislature.<sup>1</sup>

Similar considerations must also arise with regard to ratification of a Bill passed by the Parliament in exercise of its constituent power of amending the Constitution under Art. 368 (1). In *Jatin Chakravorti v. Justice H. K. Bose*,<sup>2</sup> as he then was, rightly negated a challenge to the constitutional validity of the Constitution (Fifteenth Amendment) Act, 1963, which amended Art. 217 of the Constitution raising the age of retirement of a Judge of the High Court from 60 to 62 years on the ground that no assent of the Governor in the State of W.B. was taken, observing : "A legislature discharges a variety of functions. The House has to be summoned or prorogued, bills have to be introduced, voted upon and passed, debates take place on important political questions, ministers are interrogated, and so on. The Governor, though a limb of the legislature does not take part in every such action. While the Governor summons the House and may prorogue or dissolve it (Art. 174) or address the legislature (Art. 175), he does not sit in the House or vote upon any issue. When a Bill has been passed by the House or Houses, Art. 200 requires that it shall be presented to the Governor for assent. The assent of the Governor is necessary, only because the Constitution expressly requires it. Whenever the assent of the Governor is necessary or the assent of the President is necessary, it is specifically provided for in the Constitution (See Article 31-A, 200, 201 and 304). The necessity of such assent cannot be implied, where not specifically provided for."<sup>3</sup>

Reverting to the constitutional requirement under proviso to Art. 368 (2) a ratification by the legislatures of not less than one-half of the States the Judge observed that : "So far as the State Legislatures are concerned, it requires that a resolution should be passed ratifying the amendment. Such a resolution requires voting, and the Governor never votes upon any issue".<sup>4</sup>

### 29.27. Office of Governor whether employment.

In *Hargovind v. Raghubir*<sup>5</sup> the question was whether the office of Governor was on 'employment' within the meaning of that expression in clause (d).

The word 'employment' is not a word with a single fixed meaning but it has many connotations. On the one side it may bear the narrow meaning of relationship of employer and employee and on the other, it may mean in its widest connotation any engagement or any work in which one is engaged. If the former be the sense in which the word 'employment' is used in Cl. (d) of Art. 319, the office of Governor would certainly not be an employment, because the Governor of a State is not an employee or servant of anyone. He occupies a high constitutional office with important constitutional functions and duties. The executive power of the State is vested in him and every executive action of the Government is required to be expressed to be taken in his name. He constitutes an integral part of the legislature of the State though not in the fullest sense, and is also vested with the legislative power to promulgate Ordinance while the Houses of the Legislature are not in session. He also exercises the sovereign power to grant pardons,

1. *Union of India v. Basavaiah*, 1979 SC 1415 (1423).

2. 1964 Cal 500.

3. *Union of India v. Basavaiah*, 1975 SC 1415 (1423).

4. *Ibid.*, p. 1423.

5. 1979 SC 1109 (1112).

reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. He is vested with the power to summon each House of the Legislature or to prorogue either House or to dissolve the legislative assembly and this power may be exercised by him from time to time. He is also entitled to address either House of the Legislature or both Houses assembled together and he may send messages to the House or Houses of the Legislature with respect to a bill then pending in the legislature or otherwise. No bill passed by the Houses of the Legislature can become law unless it is assented to by him and before assenting to the bill he may return the bill, provided it is not a money bill to the Houses of the Legislature for reconsideration. He has also the power to reserve for consideration of the President any bill which in his opinion would, if it became law, so derogate from the powers of the High Court as to endanger the positions which that Court is by the Constitution designed to fill. There is also one highly significant role which he has to play under the Constitution and that is of making a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is the Governor's report which generally forms the basis for the President taking action under Art. 356 of the Constitution. It will be seen from this enumeration of the constitutional powers and functions of the Governor that he is not an employee or servant in any sense of the term. It is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India. Every person appointed by the President is not necessarily an employee of the Government of India. So also it is not material that the Governor holds office during the pleasure of the President. It is a constitutional provision for determination of the term of office of the Governor and it does not make the Government of India an employer of the Governor. The Governor is the head of the State and holds a high constitutional office which carries with it important constitutional functions and duties and he cannot, therefore, even by stretching language to a breaking point, be regarded as an employee or servant of the Government of India. If, therefore, the word 'employment' were construed to mean relationship of employer and employee, the office of Governor would certainly not be employment within the meaning of Cl.(d) of Art. 319 (1).

There is a further requirement which is necessary and that is that the employment must be under the Government of India. Now, what is the meaning of this expression "*under the Government of India*"? Fortunately, there are two decisions of this Court which throw some light on this question. The first is the decision in *Pradyat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court*,<sup>1</sup> where the question was as to whether the officers and members of the staff of the High Court could be said to be persons "*serving under the Government of India or the Government of a State in a civil capacity*" so as to be within the scope of Art. 320 (3) (c) which requires consultation with the appropriate Public Service Commission in disciplinary matters. This Court, speaking through Jagannadhadas, J. pointed out: "*the phrase a person serving under the Government of India or the Government of a State, seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive Governments functioning in the name of the President or of the Governor or of a Rajpramukh.*"

1. *Hargovind v. Ragukul*, 1979 SC 1109 (1112-13).

2. (1955) 2 SCR 1331 : 1956 SC 285.



The officers and staff of the High Court cannot be said to fall within the scope of the above phrase because in respect of them the administrative control is clearly vested in the Chief Justice.....". The question which arose in the other decision in *Baldev Raj Gullani v. Punjab and Haryana High Court*<sup>1</sup> was similar one and it related to the applicability of Art. 320 (3) (c) to Judicial Officers in the State. Here in this case also court took the same view and, after referring to the earlier decision in *Pradyat Kumar Bose's* case also the court took the case with approval, held that "just as the High Court staff are not serving under the Government of the State, the Judicial Officers are also not serving under the State Government", because they are "entirely under the jurisdiction of the High Court for the purpose of control and discipline. It will, therefore, be seen that employment can be said to be under the Government of India if the holder or incumbent of the employment is under the control of the Government of India vis-a-vis such employment. Now, if one applies this test to the office of Governor, it is impossible to hold that the Governor is under the control of the Government of India. His office is not subordinate or subservient to the Government of India. He is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. His is an independent constitutional office which is not subject to the control of the Government of India. He is constitutionally the head of the State in whom is vested the executive power of the State and without whose assent there can be no legislation in exercise of the legislative power of the State. There can, therefore, be no doubt that the office of Governor is not an employment under the Government of India and it does not come within the prohibition of clause (d) of Article 319.<sup>2</sup>

It may be pointed out that the Governor of a State is not the only constitutional functionary whose employment is not under the Government. There are under the Constitution many other high functionaries, such as Judges of the Supreme Court and the High Courts, who do not hold any employment under the Government of India, although they exercise State power. This Court, while examining the constitutional position of a High Court Judge, pointed out in the *Union of India v. S. H. Sheth*<sup>3</sup> that a High Court Judge is not a Government servant : there is no relationship of employee and employer subsisting between him and the Government. He is a holder of a constitutional office which has important constitutional functions and duties. Bhagwati, J. pointed out in that case that a High Court Judge : ".....is as much part of the State as the executive Government. The State has in fact three organs, one exercising executive power, another exercising legislative power and the third exercising judicial powers. Each is independent and supreme within its allotted sphere and it is not possible to say that one is superior to the other. The High Court, constituted of the Chief Justice and other Judges, exercises the judicial power of the State and is co-ordinate in position and status with the Governor aided and advised by the Council of Ministers who exercises the executive power and the Legislative Assembly together with the Legislative Council, if any, which exercises the legislative power of the State. Plainly and unquestionably, therefore a High Court Judge is not subordinate either to the executive or to the legislature. It would indeed, be a constitutional heresy to so regard him. He has a constitutional function to discharge, which includes adjudication of the question whether the executive or the legislature has overstepped the limits of its power under the Constitution. No doubt Article 217,

1. (1977) 1 SCR 425 : 1976 SC 2490 ; *Hargovind v. Raghukul*, 1979 SC 1109 (1113).

2. *Hargovind v. Raghukul*, 1979 SC 1109 (1113).

3. (1978) 1 SCR 423 : 1977 SC 2328 (2364) ; *Hargovind v. Raghukul*, 1979 SC 1109 (1113).

clause (1) provides for appointment of a person to the office of a High Court Judge by the President, which means in effect and substance the Central Government, but that is only laying down a mode of appointment and it does not make the Central Government an employer of a High Courts Judge. In fact a High Court Judge has no employer ; he occupies a high constitutional office which is co-ordinate with the executive and the legislature."

These observations apply equally to the office of a Judge of the Supreme Court. We are mentioning this merely to bring home, through comparable constitutional functionaries, the validity of the proposition that holders of high constitutional offices exercising State power and drawing salaries from State coffers may nevertheless be not employees or servants or holders of employment under the Government.<sup>1</sup>

### 29.28. Governor when acts in his discretion

In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the Constitutional machinery may be because of the conduct of the Council of Ministers. This discretionary power is given to the Governor to enable him to report to the President who, however, must act on the advice of his Council of Ministers in all matters. In this context Article 163 (2) is explicable that the decision of the Governor in his discretion shall be final and the validity shall not be called in question. The action taken by the President on such a report is a different matter. The President acts on the advice of his Council of Ministers. In all other matters where the Governor acts in his discretion he will act in harmony with his Council of Ministers. The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers.<sup>2</sup>

The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in Articles to which reference has been made. To illustrate, Article 139 (2) states that where a Governor is appointed an Administrator of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers. The other Articles which speak of the discretion of the Governor are paragraphs 9 (2) and 18 (3) of the sixth Schedule and Articles 371-A (1) (b), 371-A (1) (d) and 371-A (2) (b) and 371-A (2) (f). The discretion conferred on the Governor means that as the constitutional or formal head of the State the power is vested in him. In this connection, reference may be made to Article 356 which states that the Governor can send a report to the President that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution. Again Article 200 requires the Governor to reserve for consideration any Bill which in his opinion if it became law, would so derogate from the powers of the High Court as to endanger the position which the High Court is designed to fill under the Constitution.<sup>3</sup>

Similarly Article 200 indicate another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to pursue such courses which are not detrimental to the State.

1. *Hargovind v. Raghukul*, 1979 SC 1109 (1114).

2. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2204).

3. *Ibid.*, p. 2197.

For the foregoing reasons the court held that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of State in all matters which vest in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. In *Samsher Singh v. State of Punjab*,<sup>1</sup> the appeals related to the appointment of persons other than District Judges to the Judicial Service of the State which is to be made by the Governor as contemplated in Article 235 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution.<sup>2</sup>

### 29.29. State Executive

Articles where the expression "acts in his discretion" is used in relation to the powers and functions of the Governor are those which speak of Special responsibilities of the Governor. These Articles are 371-A (1) (b), 371-A (1) (d), 371-A (2) (b) and 371-A (2) (f). There are two Paragraphs in the Sixth Schedule, namely, 9 (2) and 18 (3) where the words "in his discretion" are used in relation to certain powers of the Governor. Paragraph 9 (2) is in relation to determination of amount of royalties payable by licensees or lessees prospecting for, or extracting minerals to the District Council. Paragraph 18 (3) has been omitted with effect from 21 January, 1972.<sup>3</sup>

The provisions contained in Article 371-A (1) (b) speak of the Special responsibility of the Governor of Nagaland with respect to law and order in the State of Nagaland and exercise of his individual judgment as to the action to be taken. The proviso states that the decision of the Governor in his discretion shall be final and it shall not be called in question.<sup>4</sup>

Article 371-A (1) (d) states that the Governor shall in his discretion make rules providing for the composition of the regional council for the Tuensang District.<sup>5</sup>

Article 371-A (2) (b) states that for periods mentioned there the Governor shall in his discretion arrange for an equitable allocation of certain funds, between the Tuensang District and the rest of the State.<sup>6</sup>

Article 371-A (2) (f) states that the final decision on all matters relating to the Tuensang district shall be made by the Governor in his discretion.<sup>7</sup>

1. 1974 SC 2192.

2. *Samsher Singh v. State of Punjab*, 1974 SC 2192 (2204)..

3. *Ibid.*, p. 2197.

4. *Ibid.*, p. 2197.

5. *Constitution of India*, Art. 371-A (1) (d).

6. *Ibid.*, Art. 371-A (2) (b).

7. *Ibid.*, Art. 371-A (2) (b).

## Cabinet and the Prime Minister

### SYNOPSIS

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30.1. *Cabinet Meaning of.*

The Central directing instrument of Government, in legislation as well as in administration, is the Cabinet. It is in the Cabinet that administrative action is co-ordinated and legislative proposals are sanctioned. It is the Cabinet which controls Parliament and governs the country. In no other country is there such a concentration of power and such a capacity for decisive action as that possessed by the British Cabinet, provided always that it enjoys the support of a majority in the House of Commons.<sup>1</sup> Our Constitution does not use the word 'Cabinet'. It uses in its place Council of Ministers. There is no material differences between the two terms.

"A cabinet, though it is a committee of the legislative assembly, is a committee with a power which no assembly would—unless for historical accidents, and after happy experience—have been persuaded to entrust to any committee. It is a committee which can dissolve that assembly which appointed it; it is a committee with a suspensive vote—a committee with a power of appeal. Though appointed by one Parliament, it can appeal if it chooses to the next. Theoretically, indeed, the power to dissolve Parliament is entrusted to the sovereign only; and there are vestiges of doubt whether *all* cases a sovereign is bound to dissolve Parliament when the cabinet asks him to do so. But neglecting such small and dubious exceptions, the cabinet which was chosen by one House of Commons has an appeal to the next House of Commons. The chief committee of the legislature has the power of dissolving the predominant part of that legislature—that which at a crisis is the supreme legislature. The English system, therefore is not an absorption of the executive power by the legislative power; it is a fusion of the two. Either the cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. It *was* made, but it *can* unmake; it was derivative in its origin, but it is destructive in its action".<sup>2</sup>

The efficient secret of the English Constitution was described by Bagehot,<sup>3</sup> as the close union, the nearly complete fusion, of the executive and legislative powers.

'The Cabinet', he said in a word is a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation. The particular mode in which the English Ministers are selected; the fiction that they are, in any political sense, the Queen's servants; the rule which limits the choice of the cabinet to the members of the legislature are accidents unessential to its definition historical incidents separable from its nature. Its characteristics is that it should be chosen by the legislature out of persons agreeable to and trusted by the legislature. Naturally these are principally its own members but they need not be exclusively so. A cabinet which included persons not members of the legislative assembly might still perform all useful duties. Indeed the Peers, who constitute a large element in modern cabinets, are members, now a days, only of a subordinate assembly.<sup>4</sup>

A cabinet is a combining committee a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the

1. Amery : *Thoughts on the Constitution*, p. 70.

2. Bagehot : *The English Constitution*, p. 13-14.

3. *Ibid.*, p. 9.

4. Bagehot : *The English Constitution*, 1689, p. 11.

state. In its original it belongs to the one, in its functions it belongs to the other."

### 30.2. Importance of Majority in Parliament

Wilson's in his *Governance of Britain*<sup>1</sup> said that 'broadly speaking, a British government, even with the smallest of majorities, gets the greater part of its legislation through. It is more constantly at risk, but the confidence that sustains it in being is at the same time virtual guarantee that of its legislation will be passed by the Commons'.

It is, of course, a fact that the President, being directly elected by the people, not by the legislature, enjoys a unique prestige, quite apart from that adhering to his office. But in terms of power, he suffers from the doctrine of separation of powers which underlines the United States Constitution. There was, in fact, no such separation between the three constituents, legislative, executive and judiciary, which Montesquieu thought he discerned—even today we have a Cabinet member, the Lord Chancellor, who is independent head of the judiciary, speaker of the Upper House of the legislature and a member of the executive.

Even in almost equally divided Parliaments, basically the Government party of legislators aims loyally to sustain the executive, the Opposition to dislodge it. The confrontation, roughest at those times when the going is tough for the Government, is between parties, not between legislature and executive. And when, through the attrition of by-elections or the defection of one or two government supporters, a situation is created where the Government no longer commands an effective majority in the House, a general election can be forced, with incalculable results, or the Government can be pushed into resignation. This happened far more between 1832 and 1867 than in the period of more than a century since the second Reform Act.

But the significant fact of Westminster politics is that, as long as the Government can win its battles in the division lobby, even by single-figure majorities in a House of over six hundred members, it can in general get its business through. Nowhere is this more clear than in financial legislation, expenditure and taxation.

### 30.3. Bagehot's—description criticised.

"It is this doctrine, indeed these quotations that Richard Crossman specifically repudiates in his introductions to Bagehot Constitution. Indeed, he dismisses the Bagehot thesis. The discovery of 'the efficient secret', the role of Cabinet, as hyphen and buckle, he argues, was out of date even when the English Constitution was written. 'The secret which Bagehot claimed to have discovered does indeed provide the correct explanation of the relationship between the Commons and the Cabinet, as it emerged between 1832 and 1867.'<sup>2</sup> Already, in fact, by 1931 Cabinet Government in Bagehot's sense of the word had become an anachronism. It finally disappeared under the Churchill war regime. Once Sir Winston had accepted the leadership of the Conservative Party, his ascendancy became unchallengeable. As Party leader, he controlled the Conservative machine inside and outside Parliament and could therefore dictate his terms, not merely to the House of Commons but also to the Labour members of his Cabinet.'<sup>3</sup>

1. Wilson : *The Governance of Britain*, p. 170-171.

2. Mukherjee, J. in *Ram Jawaya v. State of Punjab*, had accepted this description of the Constitution.

3. Wilson : *The Governance of Britain*, p. 2-3.

'Crossman therefore concludes that the 'hyphen' which joins, the buckle which fastens, becomes one and single man with the right to select his own Cabinet and dismiss them at will, the power to decide the Cabinet's agenda and announce the decisions reached without taking vote, together with the control over patronage through the Chief Whip. When he wrote in 1963, before his near-six-years of Cabinet membership, the Cabinet for him had become :

"... the place where busy executives seek forward sanction for their actions from colleagues usually too busy—even if they do disagree—to do more than protest. Each of these executives, moreover, owes his allegiance not to the Cabinet collectively but to the Prime Minister who gave him his job, and who may well have dictated the policy he must adopt. In so far as ministers felt themselves to be agents of the Premier, the British Cabinet has now come to resemble the American Cabinet".<sup>1</sup>

Prime Minister Harold Wilson's expression was different. He in his book 'The Governance of Britain said : "for me the classical refutation of this 1963 assertion was Richard Crossman as a minister, and his unfailing, frequently argumentative, role from 1964 to 1970 in ruthlessly examining every proposal, policy or projection put before Cabinet by departmental ministers - or by the Prime minister". "Indeed, in his concluding passage in 1963, he was already prepared to concede that the legend of autocracy and unchallengeable authority was qualified by the fact that a Prime Minister can be removed. But even here he argues, he cannot be removed in real life by public constitutional procedure; the method, he says must be that of "under cover intrigue sudden unpredicted coup d'état. The inter-party struggle for power that is fought in the secret committees and in the lobbies may suddenly flare up round the Cabinet table. But if it does the proceedings there will only be ritual and the real fight will have finished before they begin."<sup>2</sup>

"My own conclusion", says Harold Wilson Prime Minister "is that the predominantly academic verdict of overriding prime ministerial power is wrong. It ignores the system of democratic checks and balances, in Parliament, in the Cabinet, and not least in the party machine and the party in the country. The checks and balances operate not only as long-term safeguards, but also, in one way or another (often unpredictable), almost every day".<sup>3</sup>

#### 30.4. Prime Minister—appointment of Ministers

The alleged freedom of a Prime Minister in Cabinet appointments, except perhaps on first coming into office, bears little relation to reality. There have to be consultations; cabinet re-shuffles are anything but set-piece movements on a chess board.<sup>4</sup>

"The 'Keystone of the Cabinet Arch', to quote Lord Morley" is the Prime Minister, with powers always great and in an emergency 'not inferior to those of a dictator'. It is his Cabinet and he has in large measure created it ; he can at any time change its composition ; his is the decisive voice in brining it to an end by dissolution or resignation. He decides when it is to convened and what it is then to discuss. He equally sums up the result of the discussion after duly considering the arguments and the personal weight of those who have used

1. Wilson : *The Governance of Britain*, p. 4.

2. *Ibid.*, p. 4.

3. *Ibid.* p. 8.

4. *Ibid.* p. 10.

them. He may, on occasion, take a vote, but this is the exception, at any rate on issues of major importance. I have never myself known a vote asked for by another members of the Cabinet.<sup>1</sup>

"Cabinet is a democracy, not an autocracy; each member of it, including the Prime Minister, seeks to convince his colleagues as to the course to follow. The Cabinet bears his stamp, it is true, on each and every policy issue, but it is the Cabinet not the Prime Minister who decides."<sup>2</sup>

The growth of the Cabinet committee system is one factor which would restrain the overweening desires of a would-be dictator. More and more decisions have to be taken there, or prepared there for Cabinet. Where there is general agreement on the committee, he would have to be a brave-or rash--Prime Minister who sought to overrule such a decision. He would not last long".<sup>3</sup>

There has been a steady accretion to the power of the Prime Minister in appointing ministers, i. e. both in selecting appointees and in allocating to them their duties. But in both tasks he faces strict limitations. A modern democratic party is a broad church; its parliamentary spectrum normally covers an even wider area than the views of the half of the country whose support it claims. So must the Cabinet. Few prime ministers, except in wartime and rarely then, could dictate to their Cabinets, except on the basis of consultation with their senior colleagues. Prime Ministers who have ignored or defied that maxim, particularly if they have refused to appoint anyone who has opposed their views or in any way given offence, and have instituted 'government by crony', have invariably paid the price. Chamberlain was an obvious, but not the only, example.<sup>4</sup>

#### 30.4. Position of Prime Minister.

The Prime Minister is the most conspicuous figure in British as well as in Indian political life; he is also by all ordinary standards, the most powerful. Ramsay Muir claimed that the Prime Minister was a "potentate who appoints and can dismiss his colleagues. He is in fact, though not in law, the working head of the state endowed with such a plenitude of power as no other constitutional ruler in the world possesses, not even the President of the United States"<sup>5</sup> Humphry Berkeley said to the *Listener*, 25 August 1966 "I accept that we are now operating a presidential system; to do otherwise would be unrealistic. Let us concede the Prime Minister's presidential powers and equip ourselves with safeguards."

Sir Anthony Eden also had said that "a Prime Minister is still normally *primus inter pares* but in fact his authority is stronger than that. The right to choose his colleagues, to ask for a dissolution of Parliament add up to a formidable total of power."<sup>6</sup>

1. Amery : *Thoughts on the Constitution*, p. 73.

2. Wilson : *Governance of Britain*, p. 8.

3. *Ibid*, p. 9

4. *Ibid*, p. 10.

5. *Ibid* p 5 F. N. 1

6. Sir Anthony Eden. *Full Circle*, p. 269 ; Quoted in Mackintosh : *Britain Cabinet*, 4th Ed., p. 628.



Lord Butler when he was asked about this specific power said : "I think that on the whole the Prime Minister has tended to stop being an equal among equals. There is tendency not exactly to dictatorship but to be the leader who does control every thing and things are getting more into his own hands."<sup>1</sup>

In this connection we might reproduce the observation of Sir Alec Douglas Home (then Lord Home) "every Cabinet Minister is in a sense the Prime Minister's agent—his assistant. There is no question about that. It is the Prime Minister's Cabinet, if the Cabinet, discusses any thing it is the Prime Minister who decides what the collective view of the Cabinet is. A Minister's job is to save the Prime Minister all the work he can. But no minister could make a really important move without consulting the Prime Minister, and if the Prime Minister wanted to take a certain step that Cabinet Minister concerned would either have to agree, argue it out in cabinet or resign."<sup>2</sup>

The present position of the Prime Minister under our Constitution is also more or less similar to British Prime Minister. Mrs. Gandhi Prime Minister had declared emergency without consulting the ministers.

### 30 6. Prime Minister's influence—Reasons for.

'The chief reasons for the relationship illustrated by the comments are' says Mackintosh<sup>3</sup> : 'party loyalty and patronage. The latter has more force with ministers than with back-benchers because ministers have set their feet on the ladder of promotion and most would prefer to go further. There is the additional point that those committed to certain policies wish to have the Prime Minister's confidence because this gives their proposal the best chance of success. The old idea that a minister who resigns or is dismissed can be a serious threat because he may really dissident feeling on the back bench has little force now a days. As a result men who leave a government soon cease to attract attention ; they revert to the status of back benchers. A final source of strength to the Prime Minister is his opportunities to time and handle his initiatives on public affairs and their reception by the mass media. In fact, he controls, through his press aides, the public relations of the government'. As Crossman puts it, the press are 'fed with the Prime Minister's interpretation of government policy and.....present him as the champion and spokesmen of the whole Cabinet.'<sup>3</sup>

These then are the sources of the Prime Minister's strength - party loyalty patronage, the support of his colleagues and of the machinery of government and his capacity, under most circumstances, to set the pace, tone and direction of activity, to set the terminal date for the government and, throughout its period of office to command public attention. As Crossman sums it up : In the battle of Whitehall, this man in the centre, this chairman, this man without a Department, without apparent power, can exert, when he is successful, a dominating personal control. This explains why a Britain Cabinet is always called a 'Wilson Cabinet' or a 'Macmillan Cabinet'. It is because every Cabinet takes its tone from the prime minister. The way the Prime Minister conducts it and administers it will give it particular tone. Usually it is dominated by his personality."<sup>4</sup>

1. Mackintosh : *Britain Cabinet*, p. 628.

2. *Ibid.*, p. 628.

3. *The Government and Politics of Britain* 3rd edn. p. 69.

3. *Inside view*, p. 67, quoted in above, p. 7.

4. *op. cit.*, pp. 71-72.

### 30.7. *Appointment of Prime Minister.*

The most important political act which the President of India does, without consulting the Council of Ministers is to appoint the Prime Minister and commission him to form Government. The choice is obvious. The essential point is that the new Prime Minister should be able to command a majority in the Lok Sabha, for the Government cannot live without a Parliamentary majority.

The main rule governing the appointment of a Prime Minister is that the leader of the party which commands a majority, usually as a result of a general election, is entitled to be invited to form a Government. When no party has secured an overall majority the practice in England has differed slightly according to circumstances. In 1923 the Conservative Government under Baldwin failed to secure an overall majority but remained the larger party. It met the House of Commons, was defeated and Baldwin then resigned. The King sent for the leader of the second largest party, Mac Donald. The Conservative Government under Baldwin again failed to secure an overall majority in 1929, but this time the Labour Party had the largest number of seats and Baldwin resigned straight away without meeting Parliament. The King sent for Mac Donald as leader of the party with the largest number of seats who again formed a Government, with the discriminating support of the Liberals. In 1974 Mr. Heath's Conservative Government failed to secure either an overall majority or the largest number of seats and resigned after he had failed to secure the support of the Liberals or any of the other minority parties. The Queen then sent for Mr. Wilson, the leader of the party with the largest number of seats.<sup>1</sup>

### 30.8. *Choice of Prime Minister on fall of Government.*

An exceptional problem in this respect faced King George V in connexion with the financial crisis of 1931, which precipitated division within and ultimately the fall of the Labour Government. The Cabinet decided to invite the Prime Minister (he assenting) to tender to the King the resignation of the Government. Mr. Mac Donald went to the palace and submitted the resignation of the Government. But the King, on the advice of Mr. Mac Donald, brought into consultation Mr. Baldwin, Leader of the Conservative Party, and Sir Herbert Samuel, who was acting Leader of the Liberal Party in the absence of Mr. Lloyd George, who was ill and who later disagreed with the line taken by his Liberal colleague.

Sir Herbert Samuel made the suggestion that Mr. MacDonald should be invited to continue in Office as Prime Minister at the head of a Government of personalities or a Coalition. Sir Herbert was a Privy Councillor and had the right to give such advice once the King had brought him into consultation; and the King had a right to receive and consider it. Mr. Baldwin acquiesced in this advice, at any rate to the extent of indicating that he would be willing to co-operate. Mr. MacDonald is said at first to have resisted, but ultimately to have agreed (without, however, consulting the Labour Cabinet), and this can fairly be construed as giving the King personal advice as Prime Minister (though a resigning one) to that effect. The King invited Mr. MacDonald to continue as Prime Minister at the head of a Coalition or a Government of personalities.<sup>2</sup>

After the general election in February 1974, no party had an over-all majority and the Conservatives who had had a majority in the out-going

1. Geoffrey Wilson : *Cases and Materials on Constitutional Law*, 2nd ed. p. 7.
2. Herbert Morrison : *Government of Parliament*, p. 77-78.

Parliament, were narrowly defeated by the Labour Party, although the balance of power was held by the Liberals and other parties. Mr. Heath, the former Prime Minister invited the Liberals to form a coalition which would have enabled him to form a new Ministry but they declined and he resigned. The Queen appointed Mr. Wilson, the Labour Prime Minister.<sup>1</sup>

A similar thing happened in our country having lost his majority, the Prime Minister Morarji Desai leader of the Janata Party in the Lok Sabha on 15th July, 1979 tendered resignation of himself and of his Council of Ministers without facing the no confidence motion. His resignation was accepted by the President and he was asked to continue in office till a new Government was formed.

The President then invited Mr. Charan Singh leader of the opposition to form the Government. He informed the President on July 22, that his attempt to form the government had failed. President then asked Charan Singh (formerly member of Desai group) and Morarji Desai on the following day to submit lists of their supporters to substantiate their claim to form a stable government. After examining the lists, it was found that Charan Singh was supported by 262 members and Desai by 238. President then invited Charan Singh on 16th July to form a government, as he enjoyed the support of more members than Desai (although not commanding an over-all majority in the Lok Sabha) but asked him to have a vote of confidence in Parliament by the third week of August. Charan Singh had served the written consent of leaders of some parties and was therefore able to convince the President that he enjoyed the support of more members, than his rival. Such a support had to be demonstrated in the Lok Sabha and not outside.

In *Adegbenro v. Akintola*<sup>2</sup> Judicial Committee of the Privy Council upheld the action of the Governor in dismissing the Prime Minister as not enjoying the confidence of the legislature merely because the majority of the legislatures had given a signed memorandum to that effect to the Governor. This decision reversed the decision of the Supreme Court of Nigeria which held that the majority support or lack of support had to be proved in the legislature and not outside it.

President did not ask Charan Singh to demonstrate before the Lok Sabha that he was in a position to form a Government. The President appointed Charan Singh as the Prime Minister and he was sworn in as Prime Minister on July 28. The President asked Charan Singh to have a vote of confidence in Lok Sabha by the third week of August. In view of the facts narrated above, it is submitted that the act of the President in appointing Charan Singh as Prime Minister was wrong, when he had no majority in the Lok Sabha.

Charan Singh on 4th August announced that Parliament would meet on August 20. In the morning of August 20 the day on which Charan Singh had to seek a vote of confidence in Lok Sabha, the Congress (I) announced that it would vote against the Government and this meant the defeat of Charan Singh's Government certain.

In these circumstances Charan Singh tendered his resignation. He advised the President that arrangements may be made for a fresh mandate from the people. On 20th August, 1979 the President accepted the resignation and requested Charan Singh to continue in the office till other arrangements were made.<sup>3</sup>

\* 1. Halsbury's *Laws of England*, 4th Ed. Vol. 1 Para 115.

2. *Adegbenro v. Akintola*, (1963) 3 All ER 544.

3. *Madan Murari v. Charan Singh*, 1980 Cal. 95.

The question immediately arose as to whether, the President was justified in calling upon Charan Singh to form the Ministry and advise the President about the formation of the Council of Ministers and also his ability to dissolve the Lok Sabha in other words, Charan Singh and his Council of Ministers, who had never obtained and who had never proved their majority in the House of People, after their resignations had been accepted, could tender advice which will be binding on the President in terms of Article 74 (1) of the Constitution. The same question arose in Calcutta, Delhi and Madras High Courts. In *Madan Murari v Charan Singh*, Sabyasachi Mukerjee J. said "Article 75 (2) indicates that the Ministers hold office during the "pleasure of the the President". The President had accepted the resignation of Charan Singh and his Council of Ministers and had asked them to continue in office till "other arrangements were made". It is the limited pleasure indicated and in that field only in my opinion Charan Singh and his Council of Ministers could function. There is no mention of any care-taker Government as such in our Constitution or in the constitutional law, though Sir Ivor Jennings has described in his book *Cabinet Government*, Third Ed. p. 85 the ministry that was formed by Mr. Churchill in England after the war before and pending the General election in 1945 as care-taker Government. But an extraordinary situation like the present, called for a care-taker Government and therefore, Charan Singh and his Council of Ministers could only carry on day to-day administration in office which were necessary for carrying on "for making alternative arrangements".

At that time it was felt by some that the President should have asked Sri Jagjivan Ram who had in the meantime been elected Leader of the Janata Party, a party whose leader was the Prime Minister and who had resigned because he thought that he lacked the confidence of the House and who had not advised dissolution of the House. Whether the President should have asked the same party by the mere fact that there was change in the leadership to form the Government or accept the advice of the Prime Minister and his Council of Ministers and dissolved the House, is a matter which constitutionally and by convention is within the discretion of the President. But the court said : "He must act on his own assessment. He is not bound constitutionally and legally by the the advice given by such a Prime Minister and Council of Ministers nor was he bound to call upon the new leader of the same party which had not faced the vote of confidence to form the Ministry. Whether the President thought it was a futile exercise or whether the President thought that the special provisions of the Constitution for the scheduled castes and scheduled tribes must be continued for some more years by amendment of the Constitution which was not possible with the present composition of the House and as such there was urgent necessity of convening a new House is a matter for the political assessment by the President with which the Court is not concerned and competent to judge. In that view of the matter, the advice of the Cabinet was tendered when the Cabinet was functioning in terms of Article 75 (3) and under Article 74 (1). the President should normally accept such an advice and therefore the advice tendered on the 20th of August, 1979 by Charan Singh was not legally and constitutionally improper and the President was, however, free to accept that advice or not to accept that advice. If the President had accepted that advice then the President cannot be said to have acted unconstitutionally, not obliged to accept the advice that Charan Singh and his Council of Ministers tendered to him except for day to-day administration and the Council of Ministers and Charan Singh should not make any decisions which are not necessary except for the purpose of carrying on the administration until other arrangements are made. This in effect means

that any decision or policy decision or any matter which can await disposal by the Council of Ministers responsible to the House of People must not be tendered by the respondent number 1 and his Council of Ministers. With this limitation the respondent No. 1 and the Council of Ministers can only function. And in case whether such advice is necessary to carry on the day-to-day administration till "other arrangements are made" or beyond that the President is free to judge.<sup>1</sup> It is true again that this gives the President powers which have not been expressly conferred by the the Constitution. But, having regard to the basic principle behind this Constitution under Article 75 (3) read with Article 74 (1) in the peculiar facts and circumstances of this case is the only legitimate, legal and workable conclusion that can be made.<sup>2</sup>

### 30.9. Prime Minister—dismissal of

British constitutional history does not offer any but a general negative guide as to the circumstances in which a sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reforms Bill of 1832, no British Sovereign has in fact dismissed or removed a Prime Minister even allowing for the ambiguous exchanges which took place between William IV and Lord Melbourne in 1834. Discussion of Constitutional doctrine bearing on a Prime Minister's loss of support in the House of Commons concentrates therefore on a Prime Ministers' duty to ask for liberty to resign or for a dissolution, rather than on the sovereign's right of removal an exercise of which is not treated as being within the scope of practical politics.

Section 33 of the Constitution of Western Nigeria provides that the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of the majority of the members of the House of Assembly. In *Adegbenro v. Akintola*<sup>3</sup> Lord Radcliffe said: "What then is the meaning of the words 'the Premier no longer commands the support of majority of the members'? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly written, constitution of the United Kingdom. It recognises the basic assumption of that constitution, as it has been developed that, so long as the elected House of representatives is in being, a majority of its members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognises also one other principle that has come to be accepted in the United Kingdom: that subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less on any simple statement of principle than on the actual facts of that situation and the good sense and political sensitivity of the main actors called on to take part."

It is said too that the "support that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their lordships are in agreement. They do not think, however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but

1. *Madan Murari Chaudhari Charan Singh*, 1980 Cal. 95.

2. *Dinesh Chand v. Chaudhary Charan Singh*, 1980 Delhi 114 (116).

3. (1963) 3 All ER 544 (548).

in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called on to vote in the House, and it appears to their lordships some what unreal to try to 'draw a firm dividing line between votes and other demonstrations where the issue of "support" is concerned.<sup>1</sup>

### 30.10. Deputy Prime Minister

There is in the British Constitution no such animal as a Deputy Prime Minister, said Harold Wilson even where a Prime Minister has formally designated a colleague as Deputy Prime Minister, this has not created any presumption that the persons nominated should be sent for on the decease or resignation of the Prime Minister. Had Winston Churchill ceased to be Prime Minister in war time, his successor would undoubtedly have been chosen from the ranks of the Conservatives, who were by far the largest party in Parliament. Clement Attlee was Deputy Prime Minister, as leader of the second most substantial partner in the coalition."<sup>2</sup>

Herbert Morrison was officially designated by Clement Attlee as Deputy Prime Minister. But when Winston Churchill sought to have Anthony Eden recognized as Deputy Prime Minister, George VI refused to agree, as he feared it might create a presumption about the succession (Winston Churchill was nearly seventy-seven). In 1962 Harold Macmillan refused to designate an official deputy, as he considered that there was no such recognized office under the constitution, though later in the year he announced that R. A. Butler would act as Deputy Prime Minister.<sup>3</sup>

Under the Indian Constitution also there is no such recognised office of Deputy Prime Minister. But while Nehru was the Prime Minister, Patel was the Deputy Prime Minister.

The contention of the petitioner was that sub-article (2) of Article 191 protected only a 'Minister' and not a Deputy Minister, and that the word 'Minister' did not include a Deputy Minister, there being no definition of 'Minister' which would include a Deputy Minister. It was held that the respondent who was holding the office of a deputy minister of the State did not incur any disqualification by reason thereof from being nominated becoming a member of the Assembly under Article 191 (1) (a) of the Constitution.

### 30.11. The Prime Minister and his Cabinet.

"You must have confidence in the judgment of the man in charge. If he has not got that confidence, he is not fit to be Prime Minister," said Clement Attlee.<sup>4</sup>

There has to be a central strategy in Cabinet formation, which must reflect the Prime Minister's broader political and policy strategy. He should be prepared to listen advice, especially that of the leader of the House and the chief whip, who are in closest touch with back-benchers, then to keep his counsel, and make his own decisions. A problem created by over-reliance on advice is that some may be based on a different strategy or approach ; do not

1. *Adegbenro v. Akintola*, (1963) 3 All ER 544 (549).

2. Harold Wilson : *The Governance of Britain*, p. 22.

3. *Ibid.*

4. *Ibid.*, p. 21.

be diverted. My experience supports that of Clement Attlee when he said, 'You may talk it over with other senior ministers. As a matter of fact, my general experience was that where I accepted advice it was not very good. I did once or twice have people foisted on me. People don't always understand why a man who seems very clever may not turn out particularly good as a Cabinet minister.'<sup>1</sup>

It cannot be denied that in England relations between the executive and the legislature are quite different from the relations existing a hundred years ago. The capacity of the Commons to remove one government and install another, to amend any legislation, to pick off individual ministers who have failed and to push the government into changes of policy has largely disappeared.<sup>2</sup>

The office of the Prime Minister is what its holder chooses and is able to make it."<sup>3</sup> "In any sphere of action Winston Churchill once wrote "there can be no comparison between the positions of member one and members two, three or four."<sup>4</sup>

Some Prime Ministers have been little more than chairmen of a committee concerned only with securing the greatest possible measure of agreement between more forceful colleagues. Others have been determined to get their own way, it might be by directly dominating the situation at the Cabinet, or it might be as the result of quiet talks outside with those whose opinions carried most weight. Some have been business like, have read all the papers up for discussion, and been mainly concerned to get decisions. Some have believed in letting everybody ventilate their troubles and in the value of desultory conversation. Some have been natural listeners disposed to lie low and say nothing either waiting to see what others thought or in order to come in with their own decisive intervention to conclude the debate. Others have been inclined towards government by monologue. Some have tended to be wet blankets and some have been an inspiration. Some have made a point of seeing something of all their colleagues, and even of junior Ministers, individually. Some have mainly confined their talks to an informal 'inner Cabinet'. Others have seen little of their colleagues except at Cabinet meetings. Some Cabinets have been happy families, others have not.

### 30.12. *Prime Minister—his individuality.*

'Every Prime Minister' wrote Prime Minister Wilson 'has a different style, in Cabinet and outside, but the aim should be informality combined with total orderliness. A touch of humour to calm things down, or to stop excessive length and preoccupation with technicalities, is not out of order. The purpose is to get the business through, with full consideration, and to reach a clear decision, with nothing fluffed or obscure and, so far as possible, an agreed decision, with the maximum emollient to wounded pride. Above all, the prime minister must keep his head, when all (or some) about him are losing theirs. In this respect as in others, Clement Attlee was a prince among prime ministers'.<sup>5</sup>

1. Wilson : *The Governance of Britain*, p. 30.

2. *Ibid.*, p.

3. Asquith H. H. : *Fifty Years of Parliament*, 1926, p. 185.

4. Winston Churchill : *Their Finest Hours*, Vol. 2.

5. Wilson : *Governance of Britain*, p. 50.

In one of the interview with Francis William which made up the book : *A Prime Minister Remembers*. Attlee summarised his style :

"A Prime Minister has to know when to ask for an opinion. He can't always stop some Ministers offering theirs, you always have some people who'll talk on every thing. But he can make sure to extract the opinion of those he wants when he needs them. The job of the Prime Minister is to get the general feeling—collect the voices. And then, when every thing reasonable has been said to get on with the job and say 'Well', I think the decision of the cabinet is this ; that or the other. Any objections ? Usually there aren't."<sup>1</sup>

The Attlee Government was not prime ministerial. Attlee was a great Prime Minister, but he believed and acted in the spirit of collective Cabinet responsibility and decision. His achievement, in Cabinet terms, was to preside over an administration headed by men of the calibre of Ernest Bevin, Stafford Cripps, Herbert Morrison, Hugh Dalton and Aneurin Bevan, and to keep them together throughout the period of post war transition. He was helped by the fact that Churchill had entrusted great responsibility to Bevin and Morrison and to a smaller extent to Stafford Cripps and Hugh Dalton, while Aneurin Bevan brought an entirely new political dimension into the Cabinet room. But Leo Amery was right when he emphasized the essential differences between Prime Ministers.<sup>2</sup>

Prof. Mackintosh<sup>3</sup> has described Attlee's conduct of Cabinet perfectly : "At Cabinet, Mr. Attlee's great objective was to stop talk. There is evidence that two ministers rightly talked themselves out of the Cabinet. Discussion was limited by the premier's habit of putting his questions in the negative. A non-Cabinet Minister with an item on the agenda would be called in at the appropriate times simply bursting to make a speech. Mr. Attlee would begin : Mr X your memo says all that could be said—"I do not suppose you have any thing to add to it." It was hard to say anything but 'Not'. Then, "Does any member of the Cabinet oppose this ? Someone would indicate a desire to contribute, and say " An interesting case occurred in 1929 which was similar to this, and I remember then that we.....Do you oppose it.....No. Very good, that is settled."

### 30 13. *Death resignation of Prime Minister.*

Mr. Jawahar Lal Nehru, Prime Minister died on 27th May, 1964. Immediately President Radhakrishnan sworn in Mr. G.L. Nanda senior cabinet minister as Prime Minister adinterim pending the election of Mr. Nehru's successor by the Congress Parliamentary Party. On June 2, 1964 Mr. Lal Bahadur Shastri was elected Prime Minister. The same procedure was followed when Sri Lal Bahadur Shastri died. Smt. Indira Gandhi was elected leader of the Congress Parliamentary Board and was sworn in as Prime Minister on January 24, 1966.

### 30.14. *Prime Minister—Selection of his minister.*

In making appointments, a Prime Minister can use any of four criteria ; personal loyalty rewarding friends personal disloyalty bribing enemies) representativeness and departmental competence.

1. Wilson : *The Governance of Britain*, p. 51.

2. *Ibid.*, p. 8.

3. Mackintosh : *British Cabinet*, p. 29 ; Wilson : *The Governance of Britain*, p. 50.

4. *Ibid.*



Constitutionally, a cabinet decision takes precedence over the decision of an individual Minister, including the Prime Minister. A Prime Minister does not want to be open to attack from within the party. Unlike the American President, a Prime Minister is bound to the Cabinet just as much as any other member. To take a position in advance of agreement in the Cabinet and then to find oneself in minority is to risk loss of office. When Harold Wilson did just this, in a Labour Government dispute on industrial relation legislation in 1969, he had to abandon his policy rather than risk government from Downing Street.<sup>1</sup>

There has been a steady accretion to the power of the prime minister in appointing ministers, i.e. both in selecting appointees and in allocating to them their duties. But in both tasks he faces strict limitations. The Parliamentary spectrum in a modern democratic party covers an even wider arc than the views of the half of the country whose support it claims. So must the Cabinet. Few Prime Ministers, except in war time and rarely then, could dictate to their Cabinets, except on the basis of consultation with their senior colleagues. Prime Minister who has ignored or defied that maxim, particularly if they have refused to appoint anyone who has opposed their views or in any way given offence, and have instituted 'government by crony', have invariably paid the price. Chamberlain was an obvious, but not, the only, example.

The alleged freedom of Prime Minister in Cabinet appointments, except perhaps on first coming into office, bears little relation to reality. There have to be consultations; cabinet re-shuffles are anything but set-piece movements on a chess board.

There is a very wild choice given to a newly appointed Prime Minister. No doubt he has to consider the claims and views of leading members of his fresh party in both the Houses. He has a very free hand in shaping his government according to his personal preferences. It is for him to decide on the size of the Cabinet and what members to include in it. He may consult a few leading colleagues or the chief whips or his personal Cronies. The Prime Minister of England has never been under any sort of direct dictation either from Parliament or from a Party Executive outside in making up government.<sup>2</sup>

In our country there is only one instance when after the China war, Nehru was persuaded rather forced to dismiss Mr. Krishna Menon from his Cabinet.

The power of the Prime Minister to appoint, reshuffle or dismiss his colleagues continues throughout his term of office.<sup>3</sup>

The Prime Minister is uniquely free in selecting his Cabinet and other members of his ministerial team. He is not fettered, for example, in the sense that an Australian Labour Prime Minister is under the unworkable system adopted there under the guise of democracy. Their 'causus' (Parliamentary Labour Party) elects the members of the Cabinet, and the Prime Minister has to allocate, to a team he has not selected, the various ministerial portfolios. The Australian Labour Party elects a certain number of people as ministers, and then they are handed over to the Prime Minister and he's told to fit them into the jigsaw. It's quite possible that someone with particular technical qualifications may get left out because he does not happen to be the popular man.<sup>4</sup> I

1. *President and Prime Minister*, p. 25.

• 2. Wilson : *The Governance of Britain*, p. 10

3. Amery : *Thoughts on the Constitution*, p. 22, 23.

• 4. *Ibid.*

5. Wilson : *The Governance of Great Britain*, p. 28.

don't believe in that at all. You must have confidence in the man in charge. If he has not got that confidence, he is not fit to be Prime Minister".

It is not a task that can be done by a group or a selection committee. To quote Clement Attlee again : "In my view, the responsibility of choosing the members of the Government must rest solely with the Prime Minister, though in practice he will consult with his colleagues. If he cannot be trusted to exercise this power in the best interest of the nation and the party without fear, favour or affection he is not fit to be a Prime Minister."<sup>1</sup>

### 30.15. *Reshuffling of the Cabinet*

Even after the Government is formed and functioning, it is usually not very long before changes become necessary. 'Reshuffle may become necessary through death or ill health, resignation, family reasons or disagreement with some aspect of government policy, dismissal of a minister, the desire to bring in some younger talent the creation of a new department, changes in priorities and problems calling for a dynamic minister in the new hot seat or simply to avoid a minister becoming stale or type-caste.'<sup>2</sup>

In the major league of re-shuffles, Harold Macmillan's night of the long knives in July 1962 undoubtedly holds the record, and no future Prime Minister will ever wish to be in a position where he has to challenge it.<sup>3</sup>

Suppose, a minister is frequently asked, but he refuses to go. Has the Prime Minister the right to require his resignation, or even to recommend his deletion from the list of ministers ?<sup>4</sup> The answer is clear; the minister holds office during the pleasure of the President.<sup>5</sup> In such matters the President accept the advice of the Prime Minister.<sup>6</sup>

### 30.16. *Council of Ministers.*

There shall be a Council Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice :

Provided that the President may require the Council of Minister to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

The word "shall does not mean "may". The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to the contention that the Article is not mandatory it would change the whole concept of the Executive. It would mean that the President need-not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no Council of Ministers, nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61.<sup>7</sup>

1. Wilson : *The Governance of Britain*, p. 28.

2. *Ibid.*, p. 33.

3. *Ibid.*, p. 33.

4. *Ibid.*, p. 34.

5. *Constitution of India*, Art. 75 (2).

6. Wilson : *The Governance of Britain*, p. 34.

7. *U. N. Rao v. Indra Gandhi*. (1971) 2 SCC 63 (67).

If Article 74 (1) is read in this manner the rest of the provisions dealing with the Executive must be read in harmony with it. Indeed they fall into place. Under Article 75 (1) the President appoints the other Ministers on the advice of the Prime Minister, and under Article 75 (2) they hold office during the pleasure of the President. The President has not said that it is his pleasure that the respondent shall not hold office.<sup>1</sup>

Article 75 provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall in the exercise of his functions act in accordance with such advice.<sup>2</sup> The President may however require the Council of Ministers to reconsider such advice, either orally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.<sup>3</sup>

Similarly there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.<sup>4</sup>

In order to tender advice to the President which is binding on him by virtue of Art. 74 (1) or by virtue of the constitutional precedents the condition precedent is the responsibility of the executive to the legislative branch. The executive must act subject to the control of the legislature. That is clear from the observations of Chief Justice Ray in the case of *Samsher Singh v. State of Punjab* (supra). It is also clear from the mandate of Article 75 (3) of the Constitution. But if there is no legislature after the dissolution of the House under Article 85 (2) of the Constitution, then, whether Article 75 (3) has any operation and as such whether the advice given by the Council of Ministers which is not or cannot be responsible to the House of the People is a delicate and difficult question. There are some observations dealing with this aspect in the case of *U. N. Rao v. Smt. Indira Gandhi*.<sup>5</sup> There the Court observed that the Council of Ministers does not cease to enjoy the confidence of the House when it is prorogued. But the question becomes more complicated and becomes without any precedent where the Council of Ministers which is tendering advice to the President had never proven its responsibility to the House or whose responsibility to the House had not been proved or demonstrated and where the Council resigned before facing a vote of confidence. There is no constitutional precedent for a situation of this nature.

### 30.17. Prime Minister—Power to dissolve Parliament.

As regards a Prime Minister's position in regard to a dissolution, Lord Oxford and Asquith, in his Fifty Years of Parliament, stated that such a question was always submitted to the Cabinet for ultimate decision.<sup>6</sup>

1. *U. N. Rao v. Indira Gandhi*, (1971) 2 SCC 63 (67).

2. *Constitution of India*, Art. 74 (1).

3. *Constitution of India*, Art. 74 (1) Proviso, added by the Constitution (Forty Fourth Amendment) Act, 1978.

4. *Ibid.*, Art. 163 (1) (2).

5. 1971 SC 1002.

6. Amery : *Thoughts on Constitution*, p. 73.

Until the First World War no one doubted that the decision to advise the Crown to dissolve Parliament was a collective decision of the Cabinet, or at any rate of those members of it who sat in the House of Commons.....For reasons which are not wholly clear, the practice since 1918 has been for the decision to rest with the Prime Minister alone, taking such advice (or none) as he sees fit. The Cabinet was not consulted over the thing of the Coupon Election nor as far as is publicly known, has it been consulted since.<sup>1</sup>

Balfour, writing to Bonar Law in 1918, said, 'I think that, whatever happens, the responsibility of a dissolution must rest with the Prime Minister. It always does so rest in fact; and on some previous occasions the Prime Minister of the day has not even gone through the form of consulting his colleagues'.<sup>2</sup>

Bonar Law in the autumn of 1916, considered that events were leading to a choice between a new government and dissolution. When Asquith resigned in 1916 the question arose whether Bonar Law could make his acceptance of the task of forming a Government conditional on the King dissolving Parliament to give him an opportunity to strengthen his position in the House of Commons. Lord Stamfordham, the King's private secretary, wrote to Lord Haldane, a former Lord Chancellor: "will you be very kind and tell me, if the King were asked to dissolve Parliament as a condition of anyone undertaking to form a Government, could his Majesty constitutionally refuse to do so? The following is Lord Haldane's reply.

1. The sovereign ought at no time to act without the advice of a responsible Minister, excepting when contemplating the exercise of his prerogative right to dismiss Ministers. The only Minister who can properly give advice as to a dissolution of Parliament is the Prime Minister.

2. The Sovereign, before acting on advice to dissolve, ought to weigh that advice. His Majesty may, instead of accepting it, dismiss the Minister who gives it, or receive his resignation. This is the only alternative to taking his advice.

3. It follows that the sovereign cannot entertain any bargain for a dissolution merely with a possible Prime Minister before the latter is fully installed. The Sovereign cannot, before that event, properly weigh the general situation and the Parliamentary position of the Ministry as formed.<sup>3</sup>

In December 1916 the King realised that the new Prime Minister would possess, this very effective weapon. Lloyd George, had said that he would use it, if the House did not support him. In November 1918 the King still did not like the idea of a dissolution but when Lloyd George was evidently intent on the election he gave way.<sup>4</sup>

That has been the case since the First World War. Baldwin did not consult the Cabinet formally before speaking to the King in 1923 or 1935. Nor did Mr. Churchill do so in 1945. The matter well be one which in these days or formal agenda and records a Prime Minister may consider more suitable for informal discussion with leading colleagues and party organizers outside the Cabinet room.<sup>5</sup>

1. Wilson : *Governance of Britain*, p. 37.

2. *Ibid.*, p. 37.

3. Wilson : *Cases and Materials on Constitutional and Administrative Law*, p. 18.

4. Mackintosh : *The British Cabinet*, p. 403.

5. Amery : *Thoughts on Constitution*, p. 78.

Clement Attlee is recorded as having 'consulted a few senior colleagues but clearly made up his mind about the dissolutions which terminated his two administrations'. "This is not my recollection in respect of 1959. In my view most Prime Minister would be likely to indicate the decision that was hardening in their minds, but be ready-although not for long to listen to a contrary view. Certainly he would almost certainly consult senior colleagues, perhaps the chief whip and leader of the house, to see what MPs were thinking. In other cases he would consult those closest to him, the chancellor if there might be any question of economic repercussion, or the foreign secretary. He would be likely, also, to get the views, in strict confidence, of the head of his party machine."<sup>1</sup>

In February 1950 the Labour Party was returned to power with an overall majority of eight. There was some discussion as to the circumstances in which the King could refuse the grant of a further dissolution of Parliament if it were advised by the Prime Minister Attlee in the hope of increasing his majority.

Lord Simon expressed the view that Mr. Attlee would have no such right. The notion that a minister who cannot command a majority in the House of Commons is invested with the *right* to demand a dissolution is as subversive of constitutional usage as it would, be pernicious to the paramount interests of the nation at large. If therefore, the Government were overthrown by an adverse vote, it would be an error to suppose that the King had no option. The King's Government would have to be carried on, and the question for the Sovereign to resolve would be whether someone else should be invited to form the government. It may, be with party representation so nearly equal on either side that the alternative government could not be found or would not last, in which case another General Election becomes unavoidable. But be that as it may, it seems important to recognise how that would come about, and not to suppose that the Sovereign is constitutionally bound to act on the advice of a Minister who is unable to carry on.<sup>2</sup>

Lord Chorley considered the opinion of Simon as unsound and dangerous. It is in the highest degree desirable that the King should remain *au dessus du combat* in respect of political manoeuvres not only in actuality but in appearance. By refusing to accept a Prime Minister's advice the King would put the Opposition into office thereby in effect giving them the opportunity of choosing the occasion for a General Election which would expose him to criticism. In such circumstances the King should be found by the clear and simple rule which there can be no mistake, and this is exactly the convention that he must accept the advice of the Prime Minister provides.<sup>3</sup>

When the head of the government resigns, or is defeated in Parliament the choice of his successor devolves upon the King alone in England and the President under our constitution. He is obliged to exercise his duty on his own responsibility, since there no longer exists a Prime Minister by whom he can be advised. In ordinary circumstances little uncertainty arises as to the successor whom the King could designate. If the Prime Minister resigns owing to defeat in Parliament, the King would send for the Leader of the Opposition. If a Prime Minister whose supporters still commands a majority in the House

1. Wilson : *The Governance of Britain*, p. 37.

2. Wilson : *Cases and Materials on Constitutional and Administrative Law*, pp. 18-19.

3. *Ibid.*, p. 19.

of Commons, resigns for the reasons of ill health there is seldom any doubt who among possible successors has the confidence of the party in power.<sup>1</sup>

### 30.18. *Parliament dissolved—office of the Prime Minister*

In *U. N. Rao's* case<sup>2</sup> the Supreme Court had to consider whether House of People being dissolved by the President on 27 December, 1970, the Prime Minister ceased to hold office thereafter. Our Constitution is modelled on the British Parliamentary system. The executive has the primary responsibility for the formation of Government policy. The executive is to act subject to control by the Legislature. The President acts on the aid and advice of the Council of Ministers with the Prime Minister at the head. The Cabinet enjoying as it does a majority in the Legislature concentrate in itself the virtual control of both legislative and executive functions. Article 74 (1) which states that there shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President in the legislative functions is mandatory. The contention that on the President dissolving the House, there will be no Prime Minister was not accepted because it would change the entire concept of the executive Government. If there will be no Council of Ministers, the President will not have a Prime Minister and Minister to aid and advice in the exercise of his functions. As there will be no Council of Ministers, nobody will be responsible to the House of the People. Article 75 states that the Prime Minister will be appointed by the President and the other Ministers shall be appointed on the advice of the Prime Minister. Article 75 (3) states that the Council of Ministers is collectively responsible to the Government. This is the basis of responsible Government. Article 75 (3) by itself may not apply when the House of People is dissolved or prorogued. But the harmonious reading of the mandatory character of Article 75 (1) along with Articles 75 (2) and 75 (3) is that the President cannot exercise executive powers without the aid and advice of the Council of Ministers with the Prime Minister at the head. In that context Articles 77 (3) and 78 have full operation for duties of the Prime Minister and allocation of business among Ministers.<sup>3</sup> When the President accepts the advice of the Prime Minister to dissolve the Parliament, it does not and can not mean that the Prime Minister and the Council of Ministers would cease to function. Till the next election the work of the government must go on and the President has to make some arrangement. Till such time the Prime Minister and Council of Ministers will continue to aid and advise the President in the exercise of his functions. There is nothing in the Constitution which requires that the Prime Minister when he exercise his constitutional power to advise the President to dissolve the Parliament, must resign or should be dismissed by the President. The contention raised in *U. N. Rao v. Indira Candhi's* case (supra) would make the Constitution unworkable, which in no case can be permissible.

### 30.19. *Joint and Collective responsibility of Ministers.*

The Cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of the joint responsibility. That does not mean that each and every decision must be taken by the Cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or only

1. Nicholson : *George V*, p. 275.

2. (1971) Supple. SCR 46 : 1971 SC 1002 ; *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2200).

3. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2200).

of the government functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his Ministry. This again his political responsibility and not personal responsibility.

Even the most hard working Minister cannot attend to every business in his department. In every planned administration most of the decisions are taken by the Civil Servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day today administration. His primary function is to lay down the policy and programmes of his Ministry while the Council of Ministers settle the Major policies and programmes of the government. When a civil servant takes a decision he does not do it as delegate of his Minister.<sup>1</sup> He does it on behalf of the Government. It is always open to a Minister to call for any file in his Ministry and pass orders. He may also issue directions to the officers in his Ministry regarding the disposal of Government business either generally or as regard any specific case. Subject to that over all power the officer designated by the Rules or the Standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates,<sup>2</sup> Where functions are entrusted to a Minister and those are performed by an official employed in the Ministry's department, there is in law on delegation because constitutionally the act or decision of the official is that of the Minister.<sup>3</sup>

In *Sanjeevi Naidu's* case<sup>3</sup> the validity of the scheme was challenged on the ground that it was not framed by the State Government but by the Secretary to the Government pursuant to powers conferred on him under Rule 23-A of the Madras Government business Rules. The Supreme Court upheld the scheme on the ground that the functions under the Motor Vehicles Act had been allocated by the Governor to the Transport Minister under "The Rules" and the Secretary of that Ministry had been validly authorised under Rule 23-A to take action under Section 68-C of the Act.

The collective responsibility of the Cabinet for every decision was firmly laid down in England long before the Cabinet, with its responsibility to Parliament, developed in its present form. The Younger Pitt in 1792 dismissed his Lord Chancellor for publicly dissociating himself from Pitt's creation of his Sinking Fund, the earliest known assertion of the principle of collective Cabinet responsibility. From that time the doctrine has never been seriously challenged. Lord Salisbury in 1878 set it out in what has been regarded as the classic formulation<sup>4</sup> 'My Lords my noble friend (Earl of Derby) pointed out several measures of the Government to which in the public eye he was an assenting party. He did not, he said, 'in reality assent to all' "One was compromised, while to another, he was persuaded by some observations which fell from the Chancellor of the Exchequer, which appeared to be founded on a mistake. Now my Lords am I not defending a great constitutional principle, when I say that for all that passes in Cabinet, each member of it who does not resign is absolutely and irretrievably responsible, and the he has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by one of his colleagues. Consider the inconvenience which will arise if a such a great constitutional law is not respected. It is, I maintain

1. *Sanjeevi Naidu v. State of Madras*, 1970 SC 1102 (1106).

\*2. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2199).

3. *Sanjeevi Naidu v. State of Madras*, 1970 SC 1102 (1106).

4. Harold Wilson : *Governance of Britain*, p. 72.

only on the principle that absolute responsibility is undertaken by every member of the Cabinet who after a decision is arrived at, remains a member of it, that the joint responsibility of ministers to Parliament can be upheld, and one of the most essential conditions of Parliamentary responsibility established'. We may refer to the quoted statement of Lord Melbourne. As his colleagues were leaving the room after reaching a conclusion on the Corn laws in 1841 : "By the bye, there is one thing we haven't agreed upon, which is what we are to say. Is it to make our corn dearer, or cheaper, or to make the price steady ? I don't care which ; but we had better all be in the same story."<sup>1</sup>

Professor Ivor Jennings favoured Joseph Chamberlain's definition, "Absolute frankness in our private relations and full discussion of all matters of common interest in decision freely arrived at should be loyally supported and considered as the decision of the whole of the Government. Of course there may be occasions in which the difference is of so vital a character that it is impossible for the minority to continue their support, and in this case the Ministry breaks up to the minority member or members resigns.

There has been some difference on whether the doctrine is binding on all ministers or only on those who participated in the decision. Gladstone, when Prime Minister took a limited view : "The rule I have stated as to the obligations of Cabinet. Ministers has for its correlation the supposition that they have been parties to the discussion of the subject in the cabinet." Prime Minister Wilson did not accept this. He said that "the principle must be strongly upheld that the doctrine of collective governmental responsibility is totally binding on a Minister, whatever he is doing or in whatever capacity he may be acting. A minister is a Minister and there can be no derogation from his obligation always to act in that capacity". According to the Prime Minister the modern doctrine is undoubtedly as formulated by Lord Simon, as Lord Chancellor, in a memorandum to a War Cabinet Committee on the machinery of the Government.<sup>2</sup>

"A husband is responsible for his wife's debts even though he does not know where she goes shopping or how big a bill she is running up. He trusts her, unless indeed he finds it necessary to give notice that she is not his agent. The same thing happens in a Cabinet, Ministers who are not in the inner circle trust the Ministers who are. Perhaps it leads to greater clearness, not to speak of ordinary Ministers as being "responsible" but to describe them as being "answerable" for what the Government does. But the Government is one, and since the whole Government may be held answerable for some act of a single department, there is nothing surprising in the proposition that Ministers must stand together, even if an individual Minister did not know and might not have approved the policy adopted by the War Cabinet."

Following is the text of a statement on the collective responsibility of ministers in all circumstances, with special reference to the National Executive Committee of the Labour Party, read to Cabinet on 3 April 1969, and authorized by Cabinet to be released to the press.<sup>3</sup>

"The Prime Minister said that there had for some time been a growing tendency for some Ministers to act in ways which called in question the collective responsibility of the Cabinet, in so far as they had apparently

1. Wilson : *Cases and Materials on Constitutional Law*, p. 57.

2. Wilson : *The Governance of Britain*, p. 74.

3. *Ibid.*, p. 191.



felt free in their personal dealings both with members of the PLP and with the Press, to dissociate themselves from certain of the Government's policies and to allow this to be known to outside bodies, particularly the Trade Unions, with whom their colleagues were often conducting difficult and delicate negotiations in the name of the Government as a whole. Before a decision was reached on any item of Government policy a Minister was entitled to defend his own point of view within the Cabinet as strongly and persuasively as he wished. But once a decision had been taken the principle of collective responsibility required every member of an Administration to endorse it and to defend it to any outside body on any occasion, whether private or public. This remained true even if the Minister was himself a member of the outside body concerned.<sup>1</sup>

"In my minute of 14 May 1974 I reminded Ministers of the principle of collective responsibility, as it applies to Ministers in their dealings with the Labour Party and in particular to Ministers who are members of the National Executive Committee. I attach copy of that minute herewith."

"That minute restated the rule that, where any conflict of loyalties arises, the principle of the collective responsibility of the Government is absolute and overriding in all circumstances and that, if any Minister feels unable to subscribe to this principle without reservation, it is his duty to resign his office forthwith."

"I reminded all members of the administration at the Eve of Session Reception at 10 Downing Street as recently as Monday of this week of their duty to comply with the requirements of collective responsibility. I made it clear that it is inconsistent with the principle of collective responsibility for a Minister who is a member of the National Executive Committee to speak or vote in favour of a resolution of that body which is critical of Government policies or which actions, or seeks to impose on the Government views or decisions which are manifestly inconsistent with Government policy."<sup>2</sup>

Articles 75 (3) and 164 (2) of the constitution speak of the collective responsibility of the Council of the Ministers as a body, to the House of the People or Legislative Assembly of the State. The object of the two Articles of the Constitution is to provide that for every decision taken by the cabinet, each one of the ministers is responsible to the legislature concerned. It is difficult to accept that for acts of corruption, nepotism or favouritism which are alleged or proved against an individual minister the entire Council of Ministers can be held collectively responsible to the legislature. If an individual minister uses his office as an occasion or pretence for committing acts of corruption, he would be personally answerable for his unlawful acts and on question of collective responsibility of the Council of Ministers can arise in such a case. As observed by Hegde, J. in *A. Sanjeevi Naidu v. State of Madras*,<sup>3</sup> the essence of collective responsibility of the Council of Ministers is that the cabinet is responsible to the legislature for every action taken in by any of the ministries. In other words, the principle of collective responsibility governs only these acts which a minister performs or can reasonably be said to have performed in the lawful discharge of his official functions.<sup>4</sup>

The object of collective responsibility is to make the whole body of persons 'holding Ministerial office collectively, or, if one may so put it,

1. Wilson : *The Governance of Britain*, p. 192.

2. *Ibid.*, p. 192.

3. 1970 SC 1102 : (1970) 3 SCR 505 (512).

4. *Karnataka State v. Union of India*, 1975 SC 68 (135).

"vicariously" responsible for such acts of the others as are referable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong.<sup>1</sup>

In *Karnataka State v. Union of India*,<sup>2</sup> an enquiry under the Commission of Inquiry Act, 1952 had been ordered by the Central Government against the Chief Minister to determine as to who was actually responsible for certain actions and what could be motive behind them. The sphere of this enquiry, Beg, CJ said was very different from that in which "collective responsibility," functions. Explaining collective responsibility the Court observed :

"If responsibility is taken in the formal constitutional sense, there would seem, granted collective governmental responsibility, to be no clear distinction to be drawn between Ministers inside and those outside the Cabinet. To be responsible in this sense simply is to share the consequences of responsibility—namely to be subject to the rule that no member of the Government may properly remain a member and dissociate himself from its policies (except on occasions when the Government permits a free vote in the house)."<sup>3</sup>

The principles that "Ministers are collectively responsible, is in truth little more than a political practice which is common place and inevitable. Ordinarily, Ministers from the governmental team, all being appointed by the Prime Minister from one political party. A Cabinet Minister deals with his own area of policy and does not normally have much to do with the area of other Ministers. Certainly no Cabinet Minister would be likely to make public statements which impugned on the work of another Minister's department. On a few important issues, policy is determined by the Cabinet after discussion. Collective responsibility means that Cabinet decisions bind all Cabinet Ministers, even if they argued in the opposite direction in Cabinet. But this is to say no more than a Cabinet Minister who finds himself in a minority must either accept the majority view or resign. The team must not be weakened by some of its members making clear in public that they disapprove of the Government's policy. And obviously what is true for Cabinet Ministers is even more true for other Ministers. If they do not like what the team is doing they must either keep quiet or leave".<sup>4</sup>

Dealing with the collective responsibility of the Council of Ministers to the Legislative Assembly of the State, Sarkar C. J., speaking for the Court said :

"Collective responsibility of Ministers to the Legislative Assembly, only means that the Council of Ministers will have to stand or fall together, every member being responsible for the action of any other."<sup>5</sup>

Collective responsibility can be applied or waived depending on the convenience of the politicians. As Mackintosh says : 'The situation has to be considered from several angles. Collective responsibility used to be enforced (from the days of Younger Pitt) because Prime Ministers and Cabinets felt too exposed to criticism if members publicly disagreed with each other. But in the modern conditions of politics, a government can keep going in the House

1. *Karnataka State v. Union of India*, 1978 SC 68 (96).

2. *Karnataka State v. Union of India*, 1978 SC 68.

3. 1978 SC 68 (97) ; Geoffrey Marshall : *Some Problems of the Constitution*.

4. *Karnataka State v. Union of India*, 1978 SC 68 ; Hartley and Griffith : *Government and Land*, p. 60.

5. *State of J. and K. v. Bakshi Ghulam Muhammad*, 1966 Suppl. SCR 401 : 1967 SC 122 (125).

of Commons provided it retains its majority. What is more important is to avoid electorally damaging resignation or 'splits' as the newspapers would describe the situation. If it is easier to prevent such damage by allowing an element of public disagreement this can be done and has been done".<sup>1</sup>

### 30.20. *Individual responsibility of Ministers*

The collective responsibility of Ministers in no way derogates from their individual responsibility. If the two conflict a Minister may always resign or be requested to resign. In 1917 Sir Austen Chamberlain, as Secretary of State for India, resigned after the report of a judicial inquiry into the conduct of the Mesopotamian campaign for which he was technically responsible. In 1922 Mr. Montagu had to resign for publishing, without consulting the Cabinet, a telegram from the Government of India pressing for a revision of the Sevres Treaty with Turkey. In 1935 Sir Samuel Hoare (Lord Templewood) resigned when the Cabinet threw over the Hoare-Laval compromise over Abyssinia. In 1938 Mr. Eden resigned in order to dissociate himself from the policy of conciliating Mussolini which Mr. Chamberlain was pursuing. The point had derived added importance in England since the innovation of War Cabinet excluding the holders of the most important offices. The responsibility of Ministers of Cabinet rank for the general policy of the Government may have been reduced, but their responsibility for decisions relating to their own department was not affected or superseded by any over-riding responsibility on the part of the actual Cabinet.<sup>2</sup>

Let us now consider whether there is any separate element of individual responsibility of a minister. "The most common political meaning is that a certain minister will answer parliamentary questions on a given subject. A second sense arises when those in political circles appreciate that a particular policy is largely the idea of the minister, rather than the traditional policy of the party in power, and they may single out the minister as responsible even if a policy is the work of the Cabinet as a whole but has colleagues choose to place the burden upon him".<sup>3</sup>

Under the British legal system though the King could not be prosecuted or sued, his ministers could be both prosecuted and sued, even for what they did by the King express command. "The Ministers are responsible", said Maitland, "before the Courts of law and before the ordinary Courts of law, and they are there responsible even for the highest acts of State; for those acts of State they can be sued or prosecuted, and the High Court of Justice will have to decide whether they are legal or no. Law, specially modern statute law, has endowed them with many great powers, but the question whether they have overstepped those powers can be brought before a court of law, and the plea "this is an official act, an act of State will not serve them. A great deal of what we mean when we talk of English liberty lies in this"<sup>4</sup>

The Minister at the head of a department is directly responsible to the Legislature. He is responsible not only for what he himself does, but for all that is done in his department. The volume of work entrusted to him is naturally very great and he can not do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials and he has

1. Mackintosh : *The British Cabinet*, p. 533.

2. Amery : *Thoughts on Constitution*, p. 71.

3. Mackintosh : *The British Cabinet*, p. 529.

4. Maitland : *Constitutional History*, p. 484.

discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he should do everything personally would be to impair his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff provided the work is done judicially and fairly in the sense indicated by Lord Loreburn the only authority that can review what has been done is the Legislature to which the Minister in charge is responsible.<sup>1</sup>

### 30.21 Agreement to differ

In England the principle of Collective Responsibility in some special circumstances was relaxed and the formula of an 'agreement to disagree' was adopted.

In 1932 the Liberal members had threatened to resign but were persuaded to remain in the Government on understanding that the normal practice of the members of the Government taking collective responsibility for its measures would be abandoned and that they would be free to speak and vote against any proposal involving the imposition on 23rd January, 1975 the Prime Minister Wilson announced that collective responsibility would be relaxed for the referendum campaign on membership of E.E.C. Wilson said 'the circumstances of this referendum are unique, and the issue to be decided is one on which strong views have long been held which cross party lines. The Cabinet has, therefore, decided that, if when the times there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government recommendation, whatever it may be, they will, once the recommendation has been announced, be free to support and speak in favour a different conclusion in the referendum campaign'.<sup>2</sup> For this relaxation of the principle of collective responsibility the Prime Minister stressed the 'unique' character of the referendum and repeatedly claimed that not only that there would be a complete return to full collective responsibility as soon as the votes had been counted, but that the Government would thereafter be stronger and not weaker, more united, not dissolved, as a consequence of the agreement to differ.<sup>3</sup>

### 30.22. Shadow Cabinet.

The chief task of a "Shadow Cabinet is to determine policy and plan parliamentary tactics. As it is free of the great bulk of administrative work, there is much more time to consider policy, though even then much is inevitably settled by the Leader of the Opposition and his chief advisers. The Shadow Cabinet is most useful in bringing ideas together, and determining the precise line which is to be explained to the rank and file of the party and put forward in the House.<sup>4</sup>

The Leader of the Opposition is never in quite the same position of power as a Prime Minister; he has either led his Party to defeat or has yet to show that he can win.<sup>5</sup>

In measuring the effectiveness of a Shadow Cabinet, many factors such as the quality of leadership, the morale of the Government, the tide of

1. *Local Govt. Board v. Arlidge* 1914 AC 120 : 1914 All ER 1 (7). by Viscount Haldane,
2. Wilson : *The Governance of Britain*, p. 75-76.
3. *Ibid.*, p. 76.
4. Mackintosh : *British Cabinet*, 4 ed p. 527.
5. *Ibid.*, p. 538.

national opinion and the nature of Government policy have all to be considered.<sup>1</sup>

### 30.23. Minister—Resignation of.

Dr. Ambedkar tendered his resignation on on Sep. 27, 1961, to Mr. Nehru who accepted it. On Nehru's request he agreed on Oct., 1 to continue in office until the end of Session. On Oct. 11, he issued a lengthy statement proving reasons for his resignation (he had intended to make before Parliament) but on being asked by the Deputy Speaker to submit a copy to the Chair before delivering it, he protested, left the Chamber, declaring that he was no longer a Minister.

### 30.24. Minister Oath of Secrecy.

Secrecy is imposed upon Ministers as to the matters passing in the Cabinet meetings. This depends on the oath of Secrecy which every Minister takes before assuming his office. Art. 75 (4) provides that before a Minister enters upon his office, the President shall administer to him the oath of secrecy according to the form prescribed in Schedule III. There is a similar provision in regard to the Ministers for the State.<sup>2</sup>

The Oath of Secrecy is in the following form :—Form of oath of secrecy for a Minister for the Union —

swear in the name of God

“I, A.B., do.....that  
solemnly affirm

I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister”.

### 30.25. Minister of State.

The Minister of State usually has a status intermediate between that of a Cabinet Minister and of a Parliamentary Secretary.<sup>3</sup>

Whenever the work of a department is particularly heavy, it is now customary to appoint a “Minister of State” to whom some branch of administrative work is delegated by the Minister concerned.<sup>4</sup>

These Ministers of State are summoned to Cabinet meetings when matters affecting their departments are under discussion, receive all the Cabinet conclusion except those of the utmost secrecy, and their full share in Cabinet Committees.<sup>5</sup>

In practice the general idea of the Minister of State is to create a Minister of higher status than that of a Parliamentary Secretary who could achieve

1. Mackintosh : *British Cabinet*, p. 539.

2. *Constitution of India*, Art. 75 (4).

3. Morrison : *Government and Parliament*, p. 58.

4. Jennings : *Cabinet Government*, p. 65.

5. *Ibid.*, p. 212.

heavy burdened departmental Ministers of material part of their work to an extent which might not be considered appropriate in the case of Parliamentary Secretaries.<sup>1</sup>

### 30.26. *Enquiry against Ministers.*

It is clear that the power conferred by Parliament on the Central Government to appoint a Commission of Inquiry under Sec. 3(1) of the Act for the purpose of finding facts in regard to the allegations of corruption, favouritism and nepotism against a sitting Chief Minister or Ministers cannot be held to constitute interference with the executive functions of the State Government. On receipt of the Commission's report, the Central Government may or may not take any action, depending upon the nature of the findings recorded by the Commission. If it decides to take any action, the validity thereof may have to be tested in the light of the constitutional provisions. But until that stage arrives, it is difficult to hold that the Central Government is exercising any control or supervisory jurisdiction over the executive functions of the State Government. As observed by the Supreme Court in *Ram Krishna Dalmia v. S.R. Tendolkar*,<sup>4</sup> "the Commission has no power of adjudication in the sense of passing an order which can be enforced proprio vigore."<sup>3</sup>

### 30.27. *Dissolution of Parliament—Effect on Art. 75*

Now comes the crucial clause (3) of Art. 75. In *U. N. Roy v. Indira Gandhi*,<sup>4</sup> the appellant urged that the House of People having been dissolved this clause could not be complied with. According to him it followed from the provisions of this clause that it was contemplated that on the dissolution of the House of People the Prime Minister and the other ministers must resign or be dismissed by the President and the President must carry on the Government as such. Art. 74 (1) is mandatory and therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. "We must" then harmonise the provisions of Art. 75 (3) with Art. 74 (1) and Art. 75 (2). Article 75 (3) brings into existence what is usually called "Responsible Government". In other words the Council of Ministers must enjoy the confidence of the House of People. While the House of People is not dissolved under Art. 85 (2)(b) Art. 75 (3) has full operation. But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of People when it was prorogued. In the context, therefore, this clause must be read as meaning that Art. 75 (3) only applies when the House of People does not stand dissolved or prorogued. We are not concerned with the case where dissolution of the House takes the place under Art. 85 (2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency to Section 14 of the Representation of the People Act, 1951."<sup>5</sup>

### 30.28. *Opposition—Role of—in Cabinet system.*

The statesman's authority rests on his party because his party has successfully appealed to the people. The party supports a policy; the democratic system implies an appeal to the people by contending parties supporting

1. Morrison : *Government and Parliament*, p. 59.

2. 1959 SCR 279, 393 : 1958 SC 538 (546).

3. *Karnataka State v. Union of India*, 1978 SC 68 (138-39).

4. *U. N. Roy v. Indra Gandhi*, 1971 SC 1002 ; *Madan Murari v. Chaudhari Charan Singh*, 1980 SC 95 (101, 102).

5. *Madan Murari v. Charan Singh*, 1980 Cal. 95.

different policies. 'Democratic Government' says Jennings 'demands not only a parliamentary majority but also a parliamentary minority. The minority attacks the Government because it denies the principles of its policy. The opposition will, almost, certainly, be defeated in the House of Commons because it is a minority. Its appeals are to the electorate. It will, at the next election, ask the people to condemn the Government, and as a consequence, to give a majority to the opposition. Because the Government is criticised it has to meet the criticism. Because it must in course of time defend itself in the constituencies it must persuade public opinions to move with it. The opposition is at once the alternative to the Government and a focus for the discontent of the people. Its functions are almost as important as that of the Government. If there be no Opposition there is no democracy. 'His Majesty's Opposition' is no idle phrase. His Majesty needs an Opposition as well as a Government'.<sup>1</sup>

The Opposition directs its criticisms with a view to convincing public opinion of its own fitness for office. Lowell in his *Government of England* said that "the expression 'His Majesty's Opposition' embodies the greatest contribution of the nineteenth century to the art of the government, that of a party out of power which is recognised as perfectly loyal to the institutions of the State and ready to come into office without a shock to the political traditions of the nation'".

The same point was made by Lord Simon : "our Parliamentary system will work as long as the responsible people in different parties accept the view that it is better that the other side should win than that the Constitution should be broken."<sup>2</sup>

This was the position when the opposition expected to be in office with the next electoral swing and political memories were longer than they are today. "Modern writers" says Mackintosh "have sometimes suggested that the tactics of the Opposition in this period has been to attack the government from every angle simply aiming to discredit it, there being no attempt to present a coherent series of alternatives."<sup>3</sup>

## THE CHIEF MINISTER OF STATES

### SYNOPSIS

- 30.29. Chief Minister and other Ministers are public servants.
- 30.30. Duties of Chief Minister.
- 30.31. Power of Chief Minister.
- 30.32. Council of Minister in a State.
- 30.33. Minister subordinate to Governor.

- 1. Jennings : *The Cabinet Government*, p. 15.
- 2. Amery : *Thoughts on the Constitution*. p. 81.
- 3. Mackintosh : *The British Cabinet*, p. 261.

**30.29. Chief Minister and other members are public servants.**

It follows that under Article 154 (1) of the Constitution the Governor may act directly or through his subordinate officer. In *Tara Singh v. Director of Holdings*<sup>1</sup> the Chief Minister had acted through the Development Minister. The question arose whether he could so act. Obviously the executive authority carried on the business of the Government and part of this business was the power given to the State Government under Section 42 of the Consolidation Act. Under Article 166 (3) of the Constitution the Governor could allocate this business to any Minister he liked..... Moreover there was no doubt a Minister was subordinate to the Governor. The Governor is the executive head of the State and this position he does not share with the Chief Minister or any other Minister. He allocates his executive duties to various Ministers under Article 166 (3) of the Constitution.<sup>2</sup>

The Governor appoints a Minister albeit on the advice of the Chief Minister and the Minister hold office during his pleasure. Therefore, it is open to a Governor under the Constitution to dismiss an individual Minister at his pleasure. In these circumstances there can be no doubt that a Minister is to be considered as an officer subordinate to the Governor. The Supreme Court found themselves in complete agreement with the view taken and the reasons given by the Punjab High Court in the case.

To the same effect is a decision of the J. & K. High Court in the case of *Bakshi Gulam Mohd. v. G. M. Sadiq*,<sup>3</sup> where Anant Singh, J. observed as follows : "A Minister of a State is paid from its public exchequer, and he is paid for doing public duty and, in my opinion, a Minister is a 'Public Officer' within the meaning of Section 80 as defined in Section 2 (17) (h) of the Civil P. C." The opinion expressed by the learned Judge is clearly in consonance with the view that the court has taken in *Karunanidhi's*<sup>4</sup> case, proved beyond doubt. These are :

1. That a Minister is appointed or dismissed by the Governor, and is, therefore, subordinate to him whatever be the nature and status of his constitutional functions.

2. That a Chief Minister or a Minister gets salary for the public work done or the public duty performed by him.

3. That the said salary is paid to the Chief Minister or the Minister from the Government funds.

4. The holder of a Public office such as the Chief Minister is a public servant in respect of whom the Constitution provides that he will get the salary from the Government Treasury so long he holds his office on account of the public service that he discharges. The salary given to the Chief Minister is conterminous with the office and is not paid like other constitutional functionaries such as the President and the Speaker. These facts, therefore, point to one and only one conclusion and that is that the Chief Minister is in the pay of the Government and is, therefore a public servant within the meaning of section 21 (12) of the Penal Code.<sup>5</sup>

1. 1958 Punj 302 (304); *Karunanidhi v. Union of India*, 1979 SC 898 (915).

2. *Ibid.*, p. 304.

3. 1968 J and K 98 (102); *Karunanidhi v. Union of India*, 1979 SC 898 (915).

4. *Karunanidhi v. Union of India*, 1979 SC 898 (915).

5. *Ibid.*, p. 915-16.



Once it is conceded that the Governor appoints the Chief Minister who is paid a salary according to a statute made by the legislature from the Government funds, the Chief Minister becomes a person in the pay of the Government so as to fall squarely within clause (12) of Section 21 of the Indian Penal Code.<sup>1</sup>

“Notwithstanding anything contained in Criminal Procedure Code, when any offence falling under Chapter XXII of the Indian Penal Code is alleged to have been committed against a person who, at the time of such commission is the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union Territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.”<sup>2</sup>

The use of the words ‘other public servants’ following a Minister of the Union or of a State clearly shows that a Minister would also be a Chief Minister.

### 30.30. Duties of Chief Minister.

It is the duty of the Chief Minister of each State—(a) to communicate to the Governor of the affairs of the State of all decisions of the Council of Ministers relating to the administration of the State and proposals for legislation ; (b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for ; and (c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.<sup>3</sup>

### 30.31. Powers of Chief Minister.

Under the Cabinet system of Government the Chief Minister occupies a position of eminence and he virtually carries on the governance of the State. The Chief Minister may call for any information which is available to the minister-in-charge of any department and may issue necessary direction for carrying on the general administration of the State Government. But he cannot usurp the statutory functions of the Registrar, Cooperative Societies under the Byelaws.<sup>4</sup>

### 30.32. Council of Ministers in a State.

Clause (4) of Article 164 must be interpreted in the context of Articles 163 and 164 of the Constitution. Article 163 (1) provides that “there shall be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion”. Under Clause (1) of Article 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They all hold office during the pleasure of the Governor. Clause (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Minister,

1. *Karunanidhi v. Union of India*, 1979 SC 898 (915-16).

2. Section 199 Cr. P. C.

3. *Constitution of India*, Art. 167; *M. Karunanidhi v. Union of India*, 1979 SC 898 (913).

4. *Chandrikat Jha v. State of Bihar*, 1984 SC 322 (325).

but clause (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf.<sup>1</sup>

It is interesting to note the position in England. According to Jennings : "It is a well settled convention that these ministers should be either peers or members of the House of Commons. There have been occasional exceptions. Mr. Gladstone once held office out of Parliament for nine months. The Scottish Law Officers sometimes, as in 1923 and 1924, were not in Parliament. General Smuts was Minister, without portfolio though not in Parliament.

### 30.33. *Minister is subordinate to Governor.*

A Minister is subordinate to the Governor. In the case of *Emperor v. Sibnath Banerji*,<sup>2</sup> the Privy Council held that the Home Minister is an officer subordinate to the Governor within the meaning of Section 49 (1) of the Government of India Act, 1935. While a Minister may have duties to the Legislature, the provision of Section 51 as to the appointment, payment and dismissal of Ministers, and Section 59 (3) and (4) of the Act of 1935, and the Business Rules made by virtue of Section 59, place beyond doubt that the Home Minister was an officer subordinate to the Governor. The Supreme Court agreed with the view taken by the Privy Council.<sup>3</sup>

1. *H. S. Verma v. T. N. Singh*, 1971 SC 1331 (1332).

2. 1945 P C 156.

3. *Karunanidhi v. Union of India*, 1979 SC 898 (914).

## Executive Power of the Union and of States

The Executive Power of the Union is vested in the President under Article 53 (1). The executive power of the State is vested in the Governor under Article 154 (1). The expression "Union" and "State" occur in Articles 53 (1) and 154 (1) respectively to bring about the federal principles embodied in the Constitution. Any action taken in the exercise of the executive power of the Union vested in the President under Article 53 (1) is taken by the Government of India in the name of President as will appear in Article 77 (1). Similarly, any action taken in the exercise of the executive power of the State vested in the Governor under Article 154 (1) is taken by the Government of the State in the name of the Governor as will appear in Article 166 (1).<sup>1</sup>

There are two significant features in regard to the executive action taken in the name of the President or in the name of the Governor. Neither the President nor the Governor may sue or be sued for any executive action of the State. First, Article 300 states that the Government of India may sue or be sued in the name of the Union and the Governor of a State may sue or be sued in the name of the State. Second, Article 361 states that proceedings may be brought against the Government of India and the Government of the State but not against the President or the Governor. Articles 300 and 361 indicate that neither the President nor the Governor can be sued for executive actions of the Government. The reason is that neither the President nor the Governor exercises the executive functions individually or personally. Executive action taken in the name of the President is the action of the Union. Executive action taken in the name of the Governor is the executive action of the State.<sup>2</sup>

Our Constitution embodies generally the Cabinet system of Government of the British model both for the Union and the State. Under this system the President is the Constitutional or formal head of the Union and he exercises his power and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102.<sup>3</sup>

- 1. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2197).
- 2. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2198).
- 3. *Ibid.*, 2198.

Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.<sup>1</sup>

The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., Ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being Ordinance making powers are executive powers of the Union vested in the President under Article 53 (1) in one case and are executive powers of the State vested in the Governor under Article 154 (1) in the other case. Clause (2) or clause (3) of Article 77 is not limited in its operation to the executive action of the Government of India under Clause (1) of Article 77. Similarly clause (2) or clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under clause (1) of Article 166. The expression "Business of the Government of India" in clause (3) of Article 77, and the expression "Business of the Government of the State" in Clause (3) of Article 166 includes all executive business.<sup>2</sup>

The executive power includes acts necessary for carrying on or supervision of the general administration of the state including both a decision as to action and the carrying out of the decision. Some of the functions exercised under executive powers may include powers such as the supervisory jurisdiction of the state government if provided by some law. But the Executive cannot, however go against the provisions of the Constitution or of any law.<sup>3</sup>

1. *Samsher Singh v. State of Punjab*, 1974 SC 2192 (2198); *Chandrika Jha v. State of Bihar*, 1984 SC 322 (325).

2. *Ibid.*, p. 2198.

3. *Chandrika Jha v. State of Bihar*, 1984 SC 322 (325).

## Conduct of Government Business

### SYNOPSIS

#### 32.1. Conduct of Government Business.

##### 32.1. *Conduct of government business.*

Under Clause (1) of Art. 77, all executive action of the Government of India shall be expressed to be taken in the name of President ; under Cl. (2) thereof, orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.<sup>1</sup> There is an identical provision in Article 166 (1) with regard to the conduct of the business of the Government of the State.

There is a difference between an executive decision and a decision taken in exercise of executive power. Every executive decisions need not be formally expressed and this is particularly so when one superior officer directs his subordinate to act or forbear from acting in a particular way, but when an executive decision is taken in exercise of Executive power and affects an outsider or is required to be officially notified or to be communicated, it should normally be expressed in the form mentioned in Article 77 in the name of the President or under Article 166 (1), in the name of the Governor.<sup>2</sup>

The validity of an order of detention made by the Bombay Government under Section 3 of the Preventive Detention Act, 1950, was considered in *State of Bombay v. Purushottam Jog Naik*.<sup>3</sup> There, the Secretary to the Government of Bombay, Home department signed the order under the words : "By order of the Governor of Bombay." It was contended that the order was defective as it was not expressed to be in the name of the

1. *Constitution of India*, Art. 77.

2. *Dattatrya, M. v. State of Bombay*, 1952 SC 181 (185).

3. 1952 SCR 674 : 1952 SC 317.

Governor within the meaning of Art. 166 (1) of the Constitution and 'accordingly was not protected by Cl. (2) of the said Article. Adverting to this contention Rose, J. speaking for the Court said ; "In our opinion, the Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there. We are unable to see how an order which purports to be an order of the Governor of Bombay can fail to be otherwise that in his name. Having regard to the definition of "State Government" in the General Clauses Act and the concluding words, "By order of the Governor of Bombay", the Court came to the conclusion that the order was expressed to have been made in the name of the Governor. In *Dattatrya Moreshwar v. State of Bombay*,<sup>1</sup> an order made 'Under the Preventive Detention Act, 1950, was questioned on the ground that it did not comply with the provisions of Art. 166 (1) of the Constitution. There the order was made in the name of the Governor and was signed by one Kharkar for the Secretary to the Government of Bombay, Home Department. Das, J., after referring to the decision of the Federal Court in *J. K. Gas Plant Manufacturing Co., Rampur Ltd. v. Emperor*,<sup>2</sup> observed : "Strict compliance with the requirements of Art. 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Government. If, therefore, the requirement of that article are not complied with, the resulting immunity cannot be claimed by the State. This however, does not vitiate the order itself. The Court came to the conclusion that the provisions of the said article were only directory and not mandatory. This decision was followed by the Supreme Court in *Joseph John v. State of Travancore Cochin*.<sup>3</sup> There the "show cause notice" issued under Art. 311 of the Constitution was impugned on the ground that it was contrary to the provisions of Art. 166, the notice was issued on behalf on the Government and was signed by the Chief Secretary to the Government, who had been under the rules of business framed by the Rajpramukh in charge of the portfolio of "service and appointment" at the secretariat level in the State. The Court held that the said notice was issued in substantial compliance with the directory provisions of Art. 166 of the Constitution.

In the absence of a formal order drawn up in terms of Article 166 of the Constitution it is certainly open to a party to prove by evidence aliunde that he had been appointed on permanent and substantive basis.<sup>4</sup> In *R. Chitrlekha v. State of Mysore*,<sup>5</sup> it was pointed out that the provisions of Article 166 of the Constitution were only directory and not mandatory and, if they were not complied with it could be established as a question of fact that the order was issued by the State Government.

The foregoing decisions authoritatively settled the true interpretation of the provisions of Art. 166 of the Constitution. Shortly stated, the legal position is this : Art. 166 (1) is only directory. Though an impugned order was not issued in strict compliance with the provisions of Art. 166 (1), it can be established by evidence aliunde that the order was made by the appropriate authority. If an order is issued in the name of the Governor and is duly authenticated in the manner prescribed in Rule (2) of the said Article, there is an irrebuttable presumption that the order of instrument is made or executed by the Governor. Any non-compliance with the provisions of the said rule does

1. 1952 SCR 674 : 1952 SC 181 ; *E.G. Barsay v. State of Bombay*, 1971 SC 1762 (1775).

2. 1947 FCR 141 : 1947 FC 38.

3. 1955 SCR 1011 : 1955 SC 160.

4. *Chaudhry, L. G. v. State of Bihar*, 1980 SC 383 (386).

5. (1964) 6 SCR 368 : 1964 SC 1823.

not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any party from proving by other evidence that as a matter of fact the order has been made by the appropriate authority. Article 77 which relates to conduct of business of the Government of India is couched in terms similar to those in Art. 166 and the same principles must govern the interpretation of that provision.<sup>1</sup>

If that be the legal position and the imugned order does not comply with the provisions of Art. 77 (2) of the Constitution, it is open to question the validity of the order on the ground that it was not an order made by the President and to prove that it was not made by the Central Government.

In *State of Rajasthan v. Sripal Jain*,<sup>2</sup> Rajasthan Rules of Business Orders were not in the form required under Article 166 of the Constitution but Wanchoo, J. said : "that it is well settled that any defect of form in the Order would not necessarily make it illegal and the only consequence of the Order not being in proper form as required by Article 166 is to show that the Order was in fact passed by it". In this case it was shown by the production of papers from the relevant file that the order was passed by the Government.

In *Chitralekha v. State of Mysore*<sup>3</sup> an order issued by the State Government appointing selection committee for admissions to the Medical and Engineering Colleges and directing the committees to add to the marks secured by the candidates at PUC examination, did not conform to the provision of Article 166 of the Constitution. It *ex facie* said that an order to the effect mentioned therein was issued by the Government and it was not denied that it had been communicated. In the circumstances that there was no allegation at all in the affidavit that the Order was not made by the Government. The Supreme Court accepted the averment by the Deputy Secretary that the Order had been issued by the Government.

The business of State is a complicated one and has necessarily to be conducted through the agency of a large numbers of officials and authorities. The Constitution, therefore, requires, and so do the Rules of Business framed by the President and the Governor, that the action must be taken by the authority concerned in the name of the President and the Governor. It is not till this formality is observed that the action can be regarded as that of the State. 'Constitutionally speaking', said Mudholkar, J. 'the minister is no more than an adviser and that the head of the State, the President or the Governor is to act with the aid and advice of his Council of Ministers. Therefore until such advice is accepted by the President or the Governor whether the Minister or the Council of Ministers may say in regard to a particular matter does not become the act of the State untill the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State.'<sup>4</sup>

Article 77 (3) of the Constitution requires the President to make rules for the more convenient transaction of the business of the Government of India and for the allocation among Ministers of the said business. Article 166 (3) of the Constitution enacts identical provision requiring the Governor to make rules.

1. *E. G. Barsay v. State of Bombay*, 1961 SC 1762 (1776).
2. 1963 SC 1323 (1326).
3. 1964 SC 1823 (1829).
4. *Ibid.*, p. 1829.

Section 59 (3) of the Government of India Act, 1935 contained provision similar to Article 166 (3) of the Constitution. In *King Emperor v. Siba Nath Banerjee*,<sup>1</sup> the question was whether the satisfaction of the Governor meant the personal satisfaction as to matters set out in the Rule 26 of the Defence of India Rules. It was held that these matters could be dealt with by him in the normal manner in which the executive business of the Provincial Government, was carried on and in particular under Section 49 of the 1935 Act and the provisions of the Rules of Business made under the aforesaid section 59 of 1935 Act. The orders of detention were held to be regular and appropriate. A presumption of constitutionality was also to be implied under the Rules of Business. The presumption of course could be rebutted.<sup>2</sup>

Decisions of the Supreme Court are based on the root authority in *King Emperor v. Sibnath Banerjee*,<sup>3</sup> Section 59 (3) of the Government of India Act, 1935 is similar to Article 166 (3) of our Constitution.

In *Kalyan Singh v. State of U. P.*,<sup>4</sup> the Supreme Court repelling the contention that the opinion formed by an official of the Government did not fulfil the requirements of Section 68 (b) of the Motor Vehicles Act observed : "The opinion must necessarily be formed by somebody to whom, under the rules of business, the conduct of the business is entrusted and that opinion, in law, will be the opinion of the State Government. It was stated in the counter-affidavit that all the concerned officials in the Department of Transport had considered the draft scheme and the said scheme was finally approved by the Secretary of the Transport Department before the notification was issued. It was not denied that the Secretary of the said Department had power under the rules of business to act for the State Government in that behalf". The Supreme Court therefore, held that in that case the opinion was formed by the State transport undertaking within the meaning of Section 68 (c) of the Act, and that, there was nothing illegal in the manner of initiation of the said Scheme. State Government obviously was not a natural person and therefore some natural person had to give bearing on behalf of the State Government and hence the hearing given by the Special Secretary pursuant to the power conferred on him by the business rules framed under Article 166 (3) was a valid hearing.<sup>5</sup>

In *Ishwarilal Girdharilal Joshi v. State of Gujarat*,<sup>6</sup> the Supreme Court rejected the contention that the opinion formed by the Deputy Secretary under Section 17 (1) of the Land Acquisition Act could not be considered as the opinion of the State Government. After referring to the rules of business regulating the government business, the Court observed : "In our case the Secretaries concerned were given the jurisdiction to take action on behalf of Government and satisfy themselves about the need for acquisition under Section 6, the urgency of the matter and the existence of waste and arable lands for the application of sub-sections (1) and (4) of Section 17. In view of the Rules of business and the instructions their determination became the determination of Government and no exception could be taken."

The Supreme Court in *Bejoy Lakshmi Cotton Mills Ltd. v. State of West Bengal*,<sup>7</sup> considered the validity of a notification signed by the Assistant

1. 1945 PC 156.

2. *Ibid* ; *Capital Multipurpose Corp. Society v. State of M. P.*, 1957 SC 1815.

3. 72 Ind. App. 421 ; 1945 PC 156.

4. (1962) Supp. 2 SCR 76 : 1962 SC 1183.

5. *Capital Mult Purpose Corp. Society v. State of M. P.*, 1967 1815.

6. (1968) 2 SCR 266 : 1968 SC 870.

7. (1967) 2 SCR 406 : 1967 SC 1145.



Secretary in the Land and Revenue Department of the State Government. It was contended that the executive power of the State was vested in the Governor under Article 154 (1) of the Constitution, and, therefore, the satisfaction of the Governor was contemplated under Sections 4 and 6 of the Land Development and Planning Act under which the notification would be made. Under the Rules of Business made by the Governor under Art. 166 (3), the Governor allocated to the Minister certain matters. The Minister-in-charge issued a Standing Order specifying the matters which were required to be referred to him.

The Rules of Business in the *Bejoy Laxshmi Cotton Mills* case<sup>1</sup> indicated that the business of the Government was to be transacted in various departments specified in the Schedules. Land and Land Revenue was allocated as the business of the Department of the Minister with that portfolio. The Minister-in-charge had power to make standing orders regarding disposal of cases. The Court held that the decision of any Minister or officer under Rules of Business was a decision of the President or the Governor respectively. The Governor means, the Governor aided and advised by the Ministers. Neither Article 77 (3) nor Article 166 (3) provides for any delegation of power. Although the executive power of the State is vested in the Governor, actually it is carried on by Ministers under Rules of Business made under Article 166 (3). The allocation of business of the Government is the decision of the President or the Governor on the aid and advice of Ministers.

It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the 'Rules' or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates.<sup>2</sup>

The functions of the Governor under the rules of business of Madras government in regard to a scheme for nationalisation of certain bus routes were considered by the Supreme Court in *Sanjeevi Naidu's* case.<sup>3</sup> The validity of the scheme was challenged on the ground that it was not formed by the State Government but by the Secretary to the Government pursuant to powers conferred on him under Rule 23-A of the Madras Government Business Rules.

The scheme was upheld for these reasons. The Governor makes rules under Article 166 (3) for the more convenient transaction of business of the Government of his State. The Governor can not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or omitted to be taken in his Ministry. In every administration, decisions are taken by the civil servants. The Council of Ministers settle the major policies. When a Civil Servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government, and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Ministry's department, there is in law no delegation

- 1. *Bejoy Laxshmi Cotton Mills v. State of West Bengal*, 1967 SC 1145.
- 2. *Bejoy Laxshmi Cotton Mills v. State of West Bengal*, 1967 SC 1145.
- 3. (1970) 3 SCR 505 : 1970 SC 1102.

because constitutionally the act or decision of the official is that of the Minister.<sup>1</sup>

In *Sardari Lal's case*<sup>2</sup> an order was made by the President under sub-clause (c) to clause (2) of Article 311 of the Constitution. The order was :

"The President is satisfied that you are unfit to be retained in the public service and ought to be dismissed from service. The President is further satisfied under sub-clause (c) of proviso to Clause (2) of Article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry."

The order was challenged on the ground that the order was signed by the Joint Secretary and was an order in the name of the President of India and that the Joint Secretary could not exercise the authority on behalf of the President.<sup>3</sup>

The Supreme Court in *Sardari Lal's case*<sup>4</sup> relied on two decisions of the Court. One was *Moti Ram Deka v. General Manager N. E. F. Railway Malagaon, Pandu*,<sup>5</sup> and the other was *Jayanti Lal Amritlal Shodhan's case*<sup>6</sup> *Moti Ram Deka's* (supra) case was relied on in support of the proposition that the power to dismiss a Government servant at pleasure was outside the scope of Articles 53 and 154 of the Constitution and could not be delegated by the President or the Governor to a subordinate officer and could be exercised only by President or the Governor in the manner prescribed by the Constitution. Clause (c) of the proviso to Article 311 (2) was held by the Court in *Sardari Lal's case* (supra) to mean that the functions of the President under that provision could not be delegated to anyone else in the case of civil servant of the Union and the President had to be satisfied personally that in the interest of the security of the State it was not expedient to hold an inquiry prescribed by Article 311 (2). In support of this view the Court relied on the observation in *Jayantilal Amrit Lal Shodhan's case* (supra) that the powers of the President under Article 311 (2) could not be delegated. The Court also stated in *Sardari Lal's case* (supra) that the general consensus of the decisions was that the executive functions of the nature entrusted by certain Articles in which the President had to be satisfied himself about the existence of certain facts or state of affairs could not be delegated by him to anyone else.

In *Shamsher Singh v. State of Punjab*<sup>7</sup> it was held that the decision in *Sardari Lal's*<sup>8</sup> case that the President had to be satisfied personally in executive power or function and that the functions of the President could not be delegated was not the correct statement of law and was against the established and uniform view of the Supreme Court as embodied in several decisions to which reference had already been made. These decisions were from the year 1955 upto the year 1971. These decisions were neither referred to nor considered in *Sardari Lal's case*.<sup>8</sup>

Under our Constitution the President and the Governor are essentially constitutional heads, the administration of the State is run really by Council of

1. *Shamsher Singh v. State of Punjab*, 1975 SC 2192 (2199).

2. 1971 SC 1547.

3. *Shamsher Singh v. State of Punjab*, 1974 SC 2182 (2199).

4. (1971) 3 SCR 461 : 1971 SC 1547.

5. (1964) 5 SCR 683 : 1964 SC 600.

6. (1964) 5 SCR 294 : 1964 SC 648.

7. 1974 SC 2192 (2202).

8. (1971) 3 SCR 461 : 1971 SC 1547.

Ministers. In the very nature of things it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to avoid that difficulty the constitution has authorised the President and the Governor<sup>1</sup> to make rules for the more convenient transaction of business of the Government of the State and for the allocation among its Ministers, the business of the Government. All matters excepting these in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the President and the Governor can also make rules on the advice of the Council of Ministers for more convenient transaction of business. He can not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.<sup>2</sup>

In all case in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of the State respectively or by allocation among his Ministers of the said business in accordance with Articles 77 (3) and 166 (3) respectively. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311 (2), Proviso (c), 317, 352 (1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77 (3) nor Article 166 (3) provides for any delegation of power. Both Articles 77 (3) and 166 (3) provide that the President under Article 77 (3) and the Governor under Article 166 (3) shall make rules for the more convenient transactions of the business of the Government and the allocation of business among the Ministers of the said business. The rules of business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the rules of business made under these two Articles viz., Article 77 (3) in the case of the President and Article 166 (3) in the case of the Governor of the State is the decision of the President or the Governor respectively.<sup>3</sup>

Further the rules of business and allocation of business among the Ministers are relatable to the provisions contained in Article 53 in the case of the President and Article 154 in the case of the Governor, that the executive power shall be exercised by the President or the Governor directly or through the officers subordinate. The provisions contained in Article 74 in the case of the President and Article 163 in the case of the Governor that there shall be a Council of Ministers to aid and advise the President or the Governor, as the case may be, are sources of the rules of business. These provisions are for the discharge of the executive powers and functions of the Government in the name of the President or the Governor. Where functions entrusted to a Minister are performed by an official employed in the Minister's Department there is in law no delegation because constitutionally the act or decision of the official is that of

1. *Constitution of India*, Art. 166 (3).
2. *A Sanjeevi v. State of Madras*, 1970 SC 1101 (1106).
3. *Samsher Singh v. State of Punjab*, 1974 SC 2182 (2198).

*the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister.*<sup>1</sup>

In *Chaudhary v. State of Bihar*<sup>2</sup> the Supreme Court did not consider it necessary to express any opinion on the question whether Art. 166 (3) of the Constitution barred the court from looking into the proceedings of the Cabinet. 'It was one thing', the court said 'that the question whether any and if so what advice was tendered by Ministers to the Governor shall not be enquired into in any court' and altogether a different thing to say that the proceedings of the Council of Ministers could not be looked into even if produced without objection and without any claim of the privilege.

It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act. In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the State and not a Presidential form of Government. The powers of the Governor as the constitutional head are not different.<sup>3</sup>

The Supreme Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system. (See *Ram Jawaya Kapur v. State of Punjab*.<sup>4</sup> *A. Sanjeevi Naidu v. State of Madras*,<sup>5</sup> *U. N. Rao v. Indira Gandhi*.<sup>6</sup> In *Ram Jawaya Kapur's* case (supra) Mukherjea, C. J. speaking for the Court stated the legal position as follows: "The executive has the primary responsibility for the formulation of Governmental policy and its transmission into law. The condition precedent to the exercise of this responsibility is that the executive retains the confidence of the legislative branch of the State. The initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, the carrying on the general administration of the State are all executive functions. The executive is to act subject to the control of the Legislature. The executive power of the Union is vested in the President. The President is the formal or constitutional head of the executive. The real executive powers are vested in the Ministers with the Prime Minister as the head to aid and advise the President in the exercise of his functions."<sup>4</sup>

The functions of the Governor under the rules of business of Madras Government in regard to a scheme for nationalisation of certain bus routes were considered by the Supreme Court in *Sanjeevi Naidu's* case (supra). The validity of the scheme was challenged on the ground that it was not formed by the State Government but by the Secretary to the Government pursuant to powers conferred on him under Rule 23-A of the Madras Government Business Rules.<sup>7</sup>

The Scheme was upheld for these reasons. The Governor makes rules under Article 166 (3) for the more convenient transaction of business of the

1. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2198-99).
2. 1980 SC 383 (387).
3. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2199).
4. (1955) 2 SCR 225 (237) : 1955 SC 549 (556).
5. (1970) 3 SCR 505 (511) : 1970 SC 1102 (1106).
6. (1971) Suppl. SCR 46 : 1971 SC 1102.
7. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2199).

**Government of the State.** The Governor cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or omitted to be taken in his Ministry. In every administration, decisions are taken by the civil servants. The Minister lays down the policies. The Council of Ministers settle the major policies. When a Civil Servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are limbs of the Government and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Ministry's department, there is in law no delegation because constitutionally the act or decision of the official is that of the Minister.<sup>1</sup>

1. *Shamsher Singh v. State of Punjab*, 1974 SC 2192 (2199).

## Legislative Power of the President and the Governor

### SYNOPSIS

- 33.1. Legislative power of the President and the Governor---Historical background.
- 33.2. Articles 123 and 213.
- 33.3. Necessity for issue of Ordinance.
- 33.4. Nature of Ordinance making power.
- 33.5. Ordinance is Law---Art. 13.

#### *33.1. Legislative power of the President and the Governors---Historical background.*

Neither in England nor in the United States of America does the executive enjoy anything like the power to issue ordinances. In India, that power has a historical origin and the executive, at all times, has resorted to it freely as and when it considered it necessary to do so. One of the larger States in India has manifested its addiction to that power by making an over-generous use of it so generous indeed, that ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And, the Ordinances embrace everything under the sun, from Prince to pauper and crimes to contracts. The Union Government too, passed about 200 Ordinances between 1960 and 1980, out of which 19 were passed in 1980.

In the East India Company Act, 1773 under Section 36 the Governor-General could promulgate Ordinance. The Indian Council Act, 1861, by Section 23, thereof provided that the Governor-General in case of emergency may promulgate an Ordinance for the peace and good Government of the territories. The Government of India Act, 1915 provided in Section 72 that the Governor-General would promulgate Ordinance for the peace and good Government. The Government of India Act, 1935 by Sections 42, 43, and 45 conferred power on the Governor-General to promulgate Ordinances and Sections 88 and 89 conferred a similar power on the Governor.<sup>1</sup>

1. *R. C. Cooper v. Union of India*, (1970) 1 **SEC 248** (347).

**33.3. Articles 123 and 213.**

Article 123, of the Constitution which confers the power to promulgate ordinances, occurs in Chapter III of Part V of the Constitution, called "Legislative powers of the President". It reads thus :

If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.<sup>1</sup>

An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance (a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions ; and (b) may be withdrawn at any time by the President.

*Explanation.*—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."<sup>2</sup>

Article 213, which occurs in Part VI, Chapter IV, called "Legislative Power of the Governor" confers similar power on the Governors of States to issue ordinances.

**33.3. Necessity for issue of Ordinance.**

It will be noticed that under this Article legislative power is conferred on the President exercisable when both Houses of Parliament are not in session. It is possible that when neither House of Parliament is in session, a situation may arise which needs to be dealt with immediately and for which there is no adequate provision in the existing law and emergent legislation may be necessary to enable the executive to cope with the situation. What is to be done and how is the problem to be solved in such a case ? Both Houses of Parliament being in recess, no legislation can be immediately undertaken and if the legislation is postponed until the House of Parliament meet damage may be caused to public weal. Article 123 therefore confers powers on the President to promulgate a law by issuing an Ordinance to enable the executive to deal with the emergent situation which might well include a situation created by a law being declared void by a court of law.<sup>3</sup>

The President or the Governor is thus given legislative power to issue an Ordinance and since under our constitutional scheme as authoritatively expounded by the Supreme Court in *Shamsher Singh v. State of Punjab*,<sup>4</sup> the President or the Governor cannot act except in accordance with the aid and advice of his Council of Ministers ; it is really the executive which is invested with this legislative power.

It may appear rather unusual that the power to make laws should have been entrusted by the Constitution to the executive, because according to the

1. *Constitution of India*, Art. 123 (1).

2. *Ibid.*, Art. 123 (1) (2) (3).

3. *R. K. Garg v. Union of India*, (1981) 4 SCC 675 (686-687).

4. 1974 SC 2192

traditional outfit of a democratic political structure, the legislative power must belong exclusively to the elected representatives of the people and vesting it in the executive, though responsible to the legislature, would be undemocratic, as it might enable the executive to abuse this power by securing the passage of an ordinary bill without risking a debate in the legislature. "But if we closely analyse this provision and consider it in all its aspects" Bhagwati, J. said "it does not appear to be so startling, though we may point out even if it were, the Court would have to accept it as the expression of the collective will of the founding fathers. It may be noted, and this was pointed out forcibly by Dr. Ambedkar while replying to the criticism against the introduction of Article 123 in the Constituent Assembly".<sup>1</sup>

"My submission to the House" said Ambedkar "is that it is difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be different to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has got a new situation arisen which it must deal with *ex hypothesi*. It has not got the power to deal with that in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the power to promulgate the law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because again *ex hypothesi* the legislature is not in session. Therefore, it seems to me that fundamentally there is no objection to the provisions contained in Art. 123".<sup>2</sup>

Any power to issue Ordinances by the Executive would be consistent with free Government only when their control is lodged elsewhere than in the Executive who exercise them.<sup>3</sup> Under the Constitution the President and the Governors on their own satisfaction issue Ordinances but the control over the exercise of these powers is lodged in the Parliament or the State Legislatures.

### 33.4. Nature of Ordinance making Power.

The legislative power conferred on the President under this Art. 123 is not a parallel power of legislation. It is a power exercisable only when both Houses of Parliament are not in session and it has been conferred *ex necessitate* in order to enable the executive to meet an emergent situation. Moreover, the law made by the President by issuing an Ordinance is of strictly limited duration. It ceases to operate at the expiration of six weeks from the reassembly of Parliament or if before the expiration of the this period, resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions. This also affords the clearest indication that the President is invested with this legislative power only in order to enable the executive to tide over an emergent situation which may arise whilst the Houses of Parliament are not in session. Furthermore, this power to promulgate an Ordinance conferred on the President is coextensive with the power of Parliament to make laws and the President cannot issue an Ordinance which Parliament cannot enact into a law. It will therefore be seen that legislative power has been conferred on the executive by the constitution makers for necessary purpose and it is hedged in by limitations and conditions. The conferment of such power may appear to be undemocratic but it is not so, because the executive is clearly answerable to the legislature and if the President, on the aid and advice of the executive, promulgates an Ordinance in

1. *R. K. Garg v. Union of India*, (1981) 4 SCC 675 (687).

2. *Constituent Assembly Debates*, Vol. 1, p. 213.

3. *Youngstown Sheet and Tube Co. v. Sawyer*, 96 L ed 1153 (1208).



misuse or abuse of this power, the legislature can not only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional law complete control of the legislature over the executive, because if the executive misbehaves or forfeits the confidence of the legislature, it can be thrown out by the legislature. Of course this safeguard against misuse or abuse of power by the executive would dwindle in efficacy and value according, as if the legislative control over the executive diminishes, and the executive begins to dominate the legislature. But nonetheless it is a safeguard which protects the vesting of the legislative power in the President from the charge of being an undemocratic provision.<sup>1</sup> Chandrachud, J. in the *State of Rajasthan v. Union of India*<sup>2</sup> said there may be situations in which it is imperative to act expeditiously and recourse to the parliamentary process may, by reason of the delay involved, impair rather than strengthen the functioning of democracy. The Constitution has therefore provided safetyvalves to meet extraordinary situations. They have an imperious garb and a repressive content but they are designed to save, not destroy, democracy. The fault, if any, is not in the making of the Constitution but in the working of it".<sup>3</sup>

### 33.5. Ordinance is law under Art. 13.

Ordinance has the same force and effect as an Act passed by Parliament or the State Legislature. The heading of Chapter III of Part V of the Constitution is "Legislature Powers of the President". Clause (2) of Article 123 provides that an Ordinance promulgated under Art. 123 "shall have the same force and effect as an Act of Parliament". The only obligation on the Government is to lay the Ordinance before both Houses of Parliament and the only distinction which the Constitution makes between a law made by the Parliament and an Ordinance issued by the President is that whereas the life of a law made by the Parliament would depend upon the terms of that law, an ordinance, by reason of sub-clause (a) of clause (2), ceases to operate at the expiration of six weeks from the reassembly of Parliament, unless resolutions disapproving it are passed by both Houses before the expiration of that period.<sup>3</sup>

Clause (3) of Article 13 provides that in Article 13, "law" includes, *inter alia*, an Ordinance, unless the context otherwise requires. In view of the fact that the context does not otherwise so require, it must follow from the combined operation of clauses (2) and (3) of Art. 13 that an Ordinance issued by the President under Art. 123, which is equated by clause (2) of that Article with an Act of Parliament, is subject to the same constraints and limitations as the latter. Therefore, whether the legislation is Parliamentary or Presidential, that is to say, whether it is law made by the Parliament or an Ordinance issued by the President, the limitation on the power is that the fundamental rights conferred by Part III cannot be taken away or abridged in the exercise of that power. An Ordinance, like a law made by the Parliament, is void to the extent of the contravention of that limitation.<sup>4</sup>

The exact equation, for all practical purposes, between a law made by the Parliament and an Ordinance issued by the President is emphasised by yet

1. *R. K. Garg v. Union of India*, (1981) 4 SCC 675 (687).

2. (1978) 1 SCR 1 : (1977) 3 SCC 592 : 1977 SC 1361.

3. *A. K. Roy v. Union of India*, 1982 SC 710 (720).

4. *Ibid.*, pp. 720.

another provision of the Constitution.<sup>1</sup> Article 367 which supplies a clue to the "Interpretation" of the Constitution provides by Clause (2) that—

"Any reference in this Constitution to Acts or laws of or made by Parliament, or to Acts or laws of or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be."

It is clear from this provision, that the Constitution makes no distinction in principle between a law made by the legislature and an Ordinance issued by the President. Both, equally, are products of the exercise of legislative power and therefore, both are equally subject to the limitations which the Constitution has placed upon that power.<sup>2</sup>

Speaking for the majority in *R. C. Cooper v. Union of India*,<sup>3</sup> Shah, J. said : "The President is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating Ordinances". The Constituent Assembly therefore conferred upon the executive the power to legislate, not of course intending that the said power should be used recklessly or by imagining a state of affairs to exist when, in fact, it did not exist ; nor, indeed, intending that it should be used mala fide in order to prevent the people's elected representatives from passing or rejecting a Bill after a free and open discussion, which is of the essence of democratic process. Having conferred upon the executive the power to legislate by Ordinances, if the circumstances were such as to make the exercise of that power necessary, the Constituent Assembly subjected that power to the self-same restraints to which a law passed by the legislature is subject. That is the compromise which they made between the powers of the Government and the liberties of the people. Therefore, in face of the provisions to which reference is made. The Supreme Court did not accept the contention that an Ordinance made by the President was an executive and not a legislative act. An ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. In those inhibitions lies the safety of the people.<sup>4</sup>

Under the Government of India Act, 1935 the Governor-General had powers to make Ordinances in case of emergency.<sup>5</sup> It was held by the Privy Council in *Emperor v. Banoarilal*<sup>6</sup> that the emergency which called for immediate action had to be judged by the Governor-General alone, on promulgating an Ordinance, the Governor-General was not bound as a matter of law to expound reason that a State of Emergency did actually exist.

In *Lakhi Narayan v. Province of Bihar*,<sup>7</sup> the Federal Court relying on the Privy Council decision held that Section 88 of the Government of India Act, 1935 showed clearly that it was the Governor and the Governor alone who had

1. *A. K. Roy v. Union of India*, 1982 SC 710 (720).

2. *Ibid.*, p. 720.

3. (1970) 3 SCR 530 (559) : 1970 SC 564 (587).

4. *A. K. Roy v. Union of India*, 1982 SC 710 (721) ; *R. C. Cooper v. Union of India*, 1970 SC 564 (587).

5. Sec. 42 and Sec. 72 Schedule 9 which was latter omitted.

6. 1945 PC 48 and *Bhagat Singh v. Emperor*, 1931 PC 111.

7. 1950 FC 59 (61).

got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance and the existence of such necessity was not a justiciable matter which the courts could be called upon to determine by applying an objective test.

Under the Constitution, the President being the constitutional head normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. The clause relating to the satisfaction was composite, the satisfaction relates to existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances.

In *R. C. Cooper v. Union of India*,<sup>1</sup> it was urged that the determination by the President of the existence of the circumstances and the necessity to take immediate action on which the satisfaction depended was not declared final. The condition of satisfaction of the President was purely subjective and the Union of India was under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action. He placed reliance on the decisions of the Privy Council and of the Federal Court.

For the petitioner it was contended that the decisions of the Judicial Committee interpreted a provision which was in substance different from the provision of Article 123 and since the status of the President under the Constitution *qua* the Parliament was not the same as the Constitutional status of the Governor-General under the Government of India Act, 1935, those decisions had no bearing on the interpretation of Article 123.

The Ordinance 8 of 1969 had been repealed by Act 22 of 1969 and the question of its validity became academic and the Supreme Court felt no need to express any opinion on the extent of the jurisdiction of the court to examine whether the condition relating to satisfaction of the President had been fulfilled.<sup>2</sup>

Ray, J., however, held that : "The power under Article 123 relates to policy and to an emergency when immediate action is considered necessary and if an objective test is applied the satisfaction of the President contemplated in Article 123 will be shorn of the power of the President himself and as President will be acting on the advice of Ministers it may lead to disclosure of facts which under Article 75 (4) were not to be disclosed, For these reasons it must be held that the satisfaction of the President is subjective."<sup>3</sup>

In *S. K. G. Sugar Ltd. v. State of Bihar*,<sup>4</sup> Sarkaria, J. speaking for the Court said : "It is well settled that the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on ground of error of judgment or otherwise, in court."

The Constitution (Thirty-Eighth Amendment) Act, 1975 amended Articles

1. 1970 SCR 531 : 1970 SC 564.
2. *R. C. Cooper v. Union of India*, (1970) 1 SCC 248 (277).
3. *Ibid.*, p. 348.
4. 1974 SC 1533.

123 and 213 with retrospective effect. After clause (3) the following clause (4) was inserted :

*"Notwithstanding anything in this Constitution, the satisfaction of the President or Governor, mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground".*

The Constitution (Forty-Fourth Amendment) Act, 1978 omitted clause (4) inserted by the Constitution (Thirty-Eight Amendment) Act, 1975.<sup>1</sup>

*The effect of the Amendment is that the question whether the satisfaction of the President or of the Governor to issue an ordinance was justifiable or not, will again have to be decided by the Supreme Court.*

1. Obiter. After the coming into force of the Article 3 of 1969 the question had become merely academic.

## Extent of Executive Power of the Union and of State

### SYNOPSIS

- 34.1. Extent of executive power.
- 34.2. Scope of Articles 73 and 162.
- 34.3. Power to issue Rules under Art. 162.
- 34.4. Policy of Government---Liable to be changed.

#### 34.1. *Extent of executive power.*

Art. 73 of the Constitution relates to the executive powers of the Union while the corresponding provision in regard to the executive power of a State is contained in Art. 162. This Article 162 lays down :

“Subject to the provision of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

Thus under this Article the executive authority of the State is exclusive in respect to matters enumerated in list II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament.

Similarly Art. 73 provides that the executive power of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The proviso engrafted on Clause (1) further lays down that although with regard to the matter in the concurrent List the executive authority should ordinarily be left to the State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.<sup>1</sup>

1. *Ram Jawaya v. State of Punjab*, 1955 SC 549 (554).

### 34.2. Scope of Articles 73 and 162.

Neither of these Articles contain any definition as to what the executive function was and what activities would legitimately come within its scope. They are concerned primarily with the distribution of executive power between the Union on the one hand and the States on the other. They do not mean that it is only when the Parliament or the State legislature has legislated certain items appertaining to their respective lists, that the Union or the State executive, as the case may be can proceed to function in respect to them.<sup>1</sup> On the other hand the language of Article 162 clearly indicates that the powers of the State executive extend to matters upon which the State legislature is competent to legislate and are not confined to matters over which the legislation has been passed already. The same principle underlies Article 73 of the Constitution.<sup>2</sup>

Specific legislation may indeed be necessary if the government requires certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business a specific legislation sanctioning such course would have to be passed.<sup>3</sup>

### 34.3. Power to issue Rule under Art. 162.

These Articles do not confer any power on the Central Government or the State Government to issue rules thereunder. As a matter of fact wherever the Constitution envisages issue of rules it has so provided in specific terms. We may for example, refer to Article 309- the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions of service of persons appointed to services and posts under the Union or the State, Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances ; but that will not make such instructions statutory rules which are justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefor.

The observations in *Ram Jawaya Kapur's*<sup>4</sup> must be read in the light of the facts of the case. The executive action which was upheld in that case was, it is true, not supported by legislation, but it did not operate to the prejudice of any citizen. In the State of Punjab prior to 1950 the text books used in recognized schools were prepared by private publishers and they were submitted for approval of the Government. In 1950 the State Government published text books in certain subjects, and in other subjects the State Government approved text books submitted by publishers and authors. In 1952 a notification was issued by the Government inviting only "authors" to submit text books for approval by the Government. Under agreements with the authors and others the copyright in the text books vested absolutely in the State and the authors and others received royalty on the sale of those text books. The

1. *Ram Jawaya v. State of Punjab*, 1955 SC 549 (554).

2. *Ibid.*, p. 554.

3. *Ibid.*, p. 557.

4. (1955) 2 SCR 225 : 1955 SC 549.

petitioners—a firm carrying on the business of preparing, printing, publishing and selling text books—then moved the Supreme Court under Art. 32 of the Constitution praying for writs of mandamus directing the Punjab Government to withdraw the notifications of 1950 and 1952 on the ground that they contravened the fundamental rights of the petitioners guaranteed under the Constitution<sup>1</sup>

It was contended in support of the petition that without legislative authority the Government of the State could not enter the business of printing, publishing and selling text books. The Court held that by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights. Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive order is issued.<sup>2</sup>

A question very similar to that in *Ram Jawaya's* case did arise for consideration before a Full Bench of the Allahabad High Court in *Motilal v. Govt. of the State of Uttar Pradesh*.<sup>3</sup> The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorising the State Government to do so. Different views were expressed by different Judges on this question.<sup>4</sup>

Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the Chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law. The running of a transport business therefore was not '*per se*' outside the ambit of the executive authority of the State.<sup>5</sup>

Sapru, J. held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly conferred by Article 298 of the Constitution. Mootham and Wanchoo, JJ. who delivered a common judgment, were also of opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public.<sup>6</sup>

1. *State of M. P. v. Bharat Singh*, 1967 SC 1170 (1174).

2. *State of M. P. v. Bharat Singh*, 1967 SC 1170 (1174).

3. 1951 SC 257.

4. *Ram Jawaya v. State of Punjab*, 1955 SC 548 (555).

5. *Ibid.*, p. 555.

6. *Ram Jawaya Kapoor v. State of Punjab*, 1955 SC 549 (555).

Agarwala, J. dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwal, J. undoubtedly is too narrow and unsupportable.

**34.4. Policy of Government—Liable to be changed.**

The executive power of the Union of India, or of the States when it is not trammelled by any statute or rule, is wide and pursuant to its power. it can make executive policy. A policy once formulated is not good for ever, it is perfectly within the competence of the Union of India or the State to change it, rechange it, adjust it and readjust it according to the compulsions of circumstances and imperatives of national considerations. There is no bar to its changing the policy formulated in particular year if there are good and weighty reasons for doing so. The courts cannot suggest that a new policy should be made mere because of the lapse of time, or to suggest the manner in which such a policy should be shaped. It is entirely within the reasonable discretion of the Government. It may stick to the earlier policy or give it up. But one imperative of the Constitution implicit in Art. 14 is that if it does change its policy, it must do so fairly and should not give the impression that it is acting by any ulterior criteria or arbitrarily. This object is achieved if the new policy, assuming Government wants to frame a new policy, is made the same way in which the 1964 policy was made and not only made but made known.<sup>1</sup>

1. *Ram Jawaya Kapoor v. State of Punjab*, 1955 SC 549.



## Executive Power and Rule of Law

### SYNOPSIS

35.1. Executive power—exercise of—Limitation on exercise of.

35.2. Nature of executive power.

35.3. Executive power not arbitrary—Rule of law.

#### 35.1. *Executive power—exercise of (limitation of exercise of)*

All the powers exercised by the executive are subject to the principle that the exercise of governmental authority directly affecting individual interest must rest on legitimate foundations.<sup>1</sup>

In *R. v. Commr. of Customs & Excise*,<sup>2</sup> Lord Parker, CJ said : “I confess for my part an alarming basis, that the word of a Minister is outweighing, the law of the land.”

In *Entick v. Carrington*<sup>3</sup> said Camden, CJ ; “With respect to the argument of state necessity or a distinction which has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction.” Lord Camden, CJ was probably concerned to prevent the intrusion into English law of “reason of state” (*raison d’etat*) which was characteristic of continental despotism. If this is correct he was certainly successful ; “reason of state” has not effected an entry into English law. Within a few years, in *R. v. Straton*<sup>4</sup> Lord Mansfield, CJ had to try a case arising out of a *coup d’etat* in Madras, where the Governor had been imprisoned by his own Council. Members of the Council were subsequently put on trial in England and they argued that they had acted under the stress of necessity. In charging the jury, Lord Mansfield said : “To amount to a justification, there must appear imminent danger to the government and individual the mischief must be extreme, and such as would not admit a

1. *Entick v. Carrington*, (1765) 16 State Tr. 1029 (1068).

2. (1970) 1 All ER 1068.

3. (1765) 19 State Tr. 1029 (1073).

4. (1779) 21 State Tr. 1045.

possibility of waiting for a legal remedy ; that the safety of the government must well warrant the experiment." The defendants were in fact convicted.<sup>1</sup>

### 35.2. Nature of executive power

The people govern themselves through their representatives, and the official agencies of the executive Government possess only such powers as have been conferred upon them by the people. There is distribution of powers between the three organs of the State—legislative, executive and judicial each organ having some check direct or indirect on the other ; and then there is the rule of law which includes judicial review of arbitrary executive actions. As pointed out by Dicey<sup>2</sup> in his '*Introduction to the study of the law of the Constitution*', the expression 'rule of law' has three meanings, or may be regarded from three different points of view. 'It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government. Dicey points out 'In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the government in England; and a study of European politics now and again reminds English readers that where-ever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.'<sup>3</sup>

We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person be supported by some legislative authority.

### 35.3. Executive Power—not arbitrary—Rule of law

In *Chief Settlement Commissioner, Rehabilitation Department, Punjab v. Om Prakash*<sup>4</sup> a Division Bench of the Supreme Court observed : "In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court".

One of the essential attributes of the rule of law is that the executive action to the prejudice or the detrimental to the right of an individual must have the sanction of some law. This principle has now been well settled in a chain of authorities of the Supreme Court.<sup>5</sup>

In the case of *Rai Sahab Ram Jawaya Kapur v. State of Punjab*,<sup>6</sup> Mukerjee, J. speaking for the constitution Bench observed "Specific legislation may indeed be necessary if the government require certain powers in addition to

1. Halsbury's : *Laws of England*, 4th Edn. p. 525.

2. Dicey : *Introduction to the Study of the Law of the Constitution*, 10th Edn. p. 188.

3. *A. D. M., Jabalpur v. S. Shukla*, 1976 SC 1207 (1262).

4. 1969 SC 33 (68) : (1968) 3 SCR 653 ; *A. D. M. Jabalpur v. S. Shukla*, 1976 SC 1207. (1262).

5. *A. D. M. Jabalpur v. S. Shukla*, 1976 SC 1207 (1262).

6. (1955) 2 SCR 225 : 1955 SC 549.

what they possess under ordinary law, in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable to government to carry on their business, a specific legislation sanctioning such course have to be passed."

In *Bennett Coleman and Co. v. Union of India*<sup>1</sup> Ray, J, speaking for the majority of the Constitution Bench relied upon *State of M. P. v. Thakur Bharat Singh*<sup>2</sup> and *M/s. Ibrahim and Co.*<sup>3</sup> cases and observed : "Executive action which is unconstitutional is not immune during the proclamation of emergency. During the proclamation of emergency Article 19 is suspended. But it would not authorise the taking of detrimental executive action during the emergency affecting the fundamental rights in Article 19 with-out any legislative authority or in purported exercise of power conferred by any pre-emergency law which was invalid when enacted".

In *Shree Meenakshi Mills Ltd. v. Union of India*<sup>4</sup> the Supreme Court dealt with petitions challenging the validity of the fixation of price of cotton yarns under an executive order. Objection was raised to the maintainability of the petitions on the score of proclamation of emergency. This objection was repelled and reliance was placed on the decision of the Court in the case of *Bennett Coleman and Co.* (supra).

In *Naraindas Indurkha v. The State of Madhya Pradesh*<sup>5</sup> the Constitution Bench of the Supreme Court in which Ray C, J., Khanna and Bhagwati, JJ where parties placed reliance on the decisions in the cases of *Ram Jawaya Kapur*,<sup>6</sup> *Thakur Bharati Singh*<sup>7</sup> and *Bennett Coleman Co.*<sup>8</sup>

These authorities clearly high light the principle that executive authorities cannot under the rule of law take any action to the prejudice of an individual unless such action is authorised by law. A *fortiori* it would follow that under the rule of law it is not permissible to deprive a person of his life or personal liberty without the authority of law.

It may be appropriate at this stage to refer to other cases in which stress has been laid on rule of law by the Supreme Court.

In *District Collector of Hyderabad v. M/s Ibrahim and Co.*<sup>9</sup> the respondents who were recognized dealers in sugar were prevented by an executive order from carrying on the business. The question which actually arose for decision before the Supreme Court was whether the said order was protected under Articles 358 and 359 because of the declaration of state of emergency by the President. Shah, J. speaking for a Bench of six Judges of the Court observed : "But the executive order immune from attack is only that order which the State was competent, but for the provisions contained in Article 19 to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken. Since the order of the State Government was plainly contrary to the Statutory provisions contained in the Andhra Pradesh Sugar Dealers Licensing Order and the Sugar Control Order, it

1. 1973 SC 106.

2. 1967 SC 1170.

3. 1970 SC 1275.

4. 1974 SC 366.

5. 1974 SC 1232.

6. 1955 SC 549.

7. 1955 SC 1170.

8. 1973 SC 106.

9. (1970) 3 SCR 498 : 1970 SC 1275.

was not protected under Article 358 of the Constitution. Nor had it the protection Article 359."

Wanchoo, J. in the case of *Director of Rationing and Distribution v. The Corporation of Calcutta*<sup>1</sup> stated that in our country the rule of law prevails and our Constitution has guaranteed it by the provisions contained in Part III thereof as well as other provisions in other parts." S. K. Das, J. speaking for the Constitution Bench of the Supreme Court deprecated action taken by the State and its officers on the ground that it was destructive of the basic principle of the rule of law.<sup>2</sup>

In *G. Sadanandan v. State of Kerala*<sup>3</sup> Gajendragadkar, C. J. speaking for the Constitution Bench observed that the paramount requirement of the Constitution was that even during emergency the freedom of Indian citizens would not be taken away without the existence of justifying necessity specified by the Defence of India Rules.

In *S.G. Jaisinghani v. Union of India*.<sup>4</sup> Gajendragadkar, C J. speaking for the Constitution Bench of the Supreme Court observed as under : "In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by Rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rules of law. 'Law has reached its finest moments', stated Douglas, J. in *United States v. Wunderlick*,<sup>5</sup> when it has freed man from the unlimited discretion of some ruler. Where discretion is absolute, man has always suffered'. It is in this sense that the rule of law may be said to be sworn enemy of 'caprice' Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes*,<sup>6</sup> means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful.

In the case of *Shrimati Indira Nehru Gandhi v. Shri Raj Narain*<sup>7</sup> both Ray, C. J. and Chandrachud, J. laid stress on the rule of law in our constitutional scheme.

It would not, be correct to consider rule of law as a vague or nebulous concept because of its description as an unruly horse by Ivor Jennings. Indeed, according to Jennings, the rule of law demands in the first place that the powers of the Executive should not only be derived from law, but that they should be limited by law. Whatever might be the position in peripheral cases, there are certain aspects which constitute the very essence of the rule of law. Absence of arbitrariness and the need of the authority of law for official acts affecting prejudicially rights of individuals is one of those aspects. The power of the courts to grant relief against arbitrariness or absence of authority of law in the matter

1. (1961) 1 SCR 158 : 1930 SC 1355.

2. *Bishan Das v. State of Punjab*, (1962) 2 SCR 69 : 1961 SC 1570.

3. (1966) 3 SCR 590 : 1966 SC 1925.

4. (1967) 2 SCR 703 : 1967 SC 1427.

5. (1951) 342 US 98.

6. (1970) 4 Burr 2528 (2539).

7. (1975) Supple. SCC 1 : 1975 SC 2299.

of the liberty of the subject may now well be taken to be a normal feature of the rule of law. To quote from Halsbury's Laws of England,<sup>1</sup> the so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they authorised to do by some rule of common law or statute. The essence of rule of law, according to Prof. Goodhart, is that public officers are governed by law, which limits their powers. It means government under law—the supremacy of law over the Government, as distinct from Government by law—the mere supremacy of law in society generally—which would apply also to totalitarian states.<sup>2</sup>

S. R. Das, C. J. speaking on behalf of the Court, observed : “As said by Lord Atkin in *Eshugbayi Eleko's* case<sup>3</sup> the executive can only act in pursuance of the powers given to it by law and it cannot interfere with the liberty, and rights of the subject except on the condition that it can support the legality of its action before the Court.”

1. Third Edition Vol. 7, para 416.

2. See Phillips : *Constitutional and Administrative Law* p. 42 ; A. D. M. Jabalpur v. S. Shukla, 1976 SC 1207 (1263).

3. 1931 PC 248 : A. D. M. Jabalpur v. S. Shukla, 1976 SC 1207 (1335).

## Executive Power to Borrow

### SYNOPSIS

36.1. Executive power to borrow.

#### 36.1. *Executive power to borrow*

The executive power of the Union extends to borrowing upon the security of the Consolidated fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.<sup>1</sup>

Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under Article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.<sup>2</sup>

A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor, Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

A consent may be granted subject to such constitution if any, as the Government of India may think fit to impose.

1. *Constitution of India*, Art. 292.

2. *Ibid.*, Art. 293.

The Parliament has the power to enact laws in respect of "Public debt of the Union" under Entry 35 Union List Seventh Schedule. The State Legislature has a similar power in respect of "Public debt of the State under Entry 43 of the State List.

The power to 'borrow' includes the raising of money by the grant of annuities and the word loan will be construed accordingly.<sup>1</sup>

"Guarantee" includes any obligation undertaken before the commencement of the Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount.<sup>2</sup>

1. *Constitution of India*, Art. 366 (4).

2. *Ibid.*, Art. 366 (13).

## Executive Power of the Union to give Directions to States

### SYNOPSIS

- 37.1. Union to give directions to State Government.
- 37.2. Control of the Union over States in certain cases.
- 37.3. Scope of Article 256 and 257.
- 37.4. Article 257 (4).
- 37.5. Power of the Union to confer powers etc. on the State in certain cases.
- 37.6. No distinction between powers of President and the powers of the Union.
- 37.7. Power to the States to entrust functions to the Union.

#### 37.1. *Union to give directions to State Government.*

The executive power of every state shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

#### 37.2. *Control of the Union over States in certain cases.*

The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.<sup>1</sup>

The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance :<sup>2</sup>

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways

1. *Constitution of India, Art. 256.*
2. *Ibid., Art. 257 (2).*
3. *Ibid., Art. 257 (2) Proviso.*



or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force work.<sup>1</sup>

The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.<sup>2</sup>

Wherein carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.<sup>3</sup>

Article 256 clearly defines the limits within which the executive power of Parliament may exist and the directions contemplated by Article 256 can be given to the States only within the limited sphere as prescribed by Article 256 i. e., in relation to existing laws made by Parliament and those laws which applies in the States.<sup>4</sup>

Article 257 contains a note of warning and caution to both the Union and the States against functioning in such a way as to impede or prejudice exercise of the executive power of the Union. Article 257 contains a further restriction on the Government of India in that the power has to be exercised only for the purposes mentioned in Articles 256 and 257.<sup>5</sup>

### 37.3. *Scope of Articles 256 and 257.*

In *State of Rajasthan v. Union of India*,<sup>6</sup> the Central Government issued directions to the Governors of various States to dissolve the State Legislatures. The validity of these directions was challenged. Beg, C. J., upheld the validity on the ground : "Article 257 (1) imposes a wider obligation upon a State to exercise its powers in such a way as not to impede the exercise of executive power of the Union which would appear from Article 73 of the Constitution read with Article 248 may cover even a subject on which there is no existing law but on which some legislation by Parliament is possible. Although the constitution itself does not lay down specifically when the power of dissolution should be exercised by the Governor on the advice of a Council of Ministers in the State, yet if a direction on that matter was properly given by the Union Government, to a State Government, there is a duty to carry it out. The time for the dissolution of a State Assembly is not covered by any specific provision of the Constitution or any law made on the subject. It is possible, however, for the Union Government, in exercise of its residuary executive power to consider it a fit subject for the issue of an appropriate directions when it considers that the political solution in the country is such that a fresh election is necessary in the interest of political stability or to establish the confidence of the people in the Government of a State."<sup>7</sup>

1. *Constitution of India*, Art. 257 (Proviso).

2. *Ibid.*, Art. 257 (3).

3. *Ibid.*, Art. 257 (4).

4. *State of Rajasthan v. Union of India*, 1977 SC 1361 (1433).

5. *Ibid.*, 1433.

6. *Ibid.*, p. 1384.

7. *Ibid.*, p. 1433.

Fazal Ali, J. did not subscribe to the view of the Chief Justice. 'In his opinion the letter did not amount to a direction as contemplated by Articles 256 and 257 of the Constitution and could not be binding on the Chief Ministers as it pertained purely to the State concerned, namely giving of the advice to the Governors for dissolution of the Assembly. 'The Chief Minister', Fazal Ali, J. said "as the head of the Council of Ministers in the State has the undoubted discretion to advise the Governor to dissolve the Assembly if a particular situation demands such a step. The Chief Minister is the best judge to assess the circumstances under which such an advice should be given to the Governor. The Central Government cannot interfere with this executive power of the State Government by giving directions under Articles 256 and 257 of the Constitution because the dissolution of the Assembly by the Governor is purely a matter concerning the State and does not fall within the four corners of either Arts. 226 or 257 of the constitution.<sup>1</sup>

While enacting Article 248 of the Constitution the founding fathers trusted the Parliament, the representatives of the people and gave the Parliament to have exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. The marginal note of Article 248 is residuary powers of legislation. Though Articles 73 and 162 are worded in wide term but it is submitted that the constitution did not intend to give residuary powers to executive. If the executive is to act in respect of matters not enumerated in List II or List III, there would be an end of democracy.

It is submitted that the Article 248 will not be attracted as was held by Beg, C.J. The executive cannot give directions in regard to the dissolution of a legislature.

#### 37.4. Article 257 (4).

Article 257 provides for control of the Union over the States in certain cases. Under clause (2) thereof the executive power of the Union also extends to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance. Under clause (4) where such directions are given and "costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such directions had not been given" the Government of India must pay to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

#### 37.5. Power of the Union to confer powers etc. on State in certain cases.

Notwithstanding anything in the Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by

1. *State of Rajasthan v. Union of India*, 1977 SC 1361 (1433).

the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.<sup>1</sup>

### 37.6. *No distinction between powers of President and the powers of the Union*

The Supreme Court in *Jayantilal Amritlal Shodan v. F. H. Rana*,<sup>2</sup> considered the validity of a notification issued by the President under Article 258 (1) of the Constitution entrusting with the consent of Government of Bombay to the Commissioners of Divisions in the State of Bombay the functions of the Central Government under the Land Acquisition Act in relation to the acquisition of land for the purposes of the Union within the territorial jurisdiction of the Commissioners. The notification issued by the President was dated 24 July, 1959. The Commissioner of Baroda Division, State of Gujarat by notification published on 1 September, 1960, exercising functions under the notification issued by the President notified under Section 4 (1) of the Land Acquisition Act that certain land belonging to the appellant was needed for a public purpose. On 1 May, 1960 under the Bombay Reorganisation Act, 1960 two States were carved out viz., Maharashtra and Gujarat. The appellant contended that the notification issued by the President under Article 258 (1) was ineffective without the consent of the Government of the newly formed State of Gujarat.

The Supreme Court held that Article 258 empowered the President to entrust to the State the functions which were vested in the Union and which were exercisable by the President on behalf of the Union and further went on to say that Article 258 did not authorise the President to entrust such power as were expressly vested in the President by the Constitution and did not fall within the ambit of Article 258. The *ratio* in *Jayanti Lal Amratlal Shadhan v. F. N. Ram* case<sup>3</sup> was confined to the powers of the President which could be conferred on States under Article 258. The effect of Article 258 was to make a blanket provision enabling the President to exercise the power which legislature could exercise by legislation to entrust functions to the officers to be specified in that behalf by the President. In that case a distinction was made between the executive function of the Union and the executive function of the President. This view was not accepted by the Supreme Court in *Shamsher Singh v. State of Punjab*.<sup>4</sup>

Whether the function exercised by the President are functions of the Union or the function of the President, they have equally to be exercised with the aid and advice of the Council of Ministers and the same is true of the functions of the Governor except those which he has to exercise in his discretion. Same observations made in *Jayanti Lal's* case were accepted in *Sardari Lal's* case.<sup>5</sup> The latter case was over ruled by the Supreme Court in *Shamsher Singh v. State of Punjab* (supra). *Jayanti Lal's* case also does not lay down the correct law.

### 37.7. *Power of the States to entrust functions to the Union*

Notwithstanding anything in the Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.

1. *Constitution of India*, Art. p. 258.

2. (1964) 5 SCR 294 : 1964 SC 648.

3. 1964 SC 648 : (1964) 5 SCR 294.

4. 1974 SC 2192 : *Makhan Singh v. State of Punjab*, 1964 SC 381.

5. *Sardari Lal v. Union of India*, 1971 SC 1547 : (1971) 3 SCR 461 : (1971) 1 SCC 411.

6. *Constitution of India*, Art. 258-A.

## Executive Power—Union and State—to Carry on Trade Etc.

### SYNOPSIS

- 38.1. Executive power—to carry on Trade.
- 38.2. Government trading not governmental purpose.
- 38.3. Trade with Government—Subject to Part III.
- 38.4. Inviting tenders.
- 38.5. Citizens have no right to trade with Government.
- 38.6. Trading by Government—Principles.
- 38.7. Black-listing.

#### 38.1. *Executive power—to carry on trade.*

The executive power of the Union and of each State shall extend, subject to any law made by the appropriate legislature, to the grant, sale deposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State as the case may be.

The Constitution of India was amended in 1956 and the amended Art. 298 is given below :

The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose :

Provided that—

- (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State ; and
- (b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.

- 1. *Constitution of India*, Art. 298 (unamended)
- 2. *Ibid.*, Art. 298 (amended).

Article 298 does not open with words “subject to the provisions of the Constitution” as does Article 73 of the Constitution. Reading and considering Articles 73 and 298 together, it is clear that the executive power of the State in the matter of carrying on any trade or business with respect to which the State legislature may not make laws is subject to legislation by Parliament but is not subject to the executive power of the Union.<sup>1</sup>

Under Entry 40 of List I of the Seventh Schedule to the Constitution, Parliament has exclusive power to make laws with respect “Lotteries organised by the Government of India or the Government of the State”. Article 73 of the Constitution extends the executive power of the Union to the matters with respect to which Parliament has power to make laws and therefore, the executive power of the Union must extend to the subject lotteries organised by the Government of India and the Government of a State. But the executive power of the Union, by the very opening words of Article 73, is subject to provisions of this Constitution. It follows that the executive power of the Union with respect to the lotteries organised by the State has necessarily to be exercised subject to the provisions of the Constitution including Article 298 which expressly extends the executive power of the State to the carrying on any trade or business subject only to legislation by Parliament if the trade or business is not one with respect to which the State legislature may make laws.

The right of the State to carry on trade or business is recognized by Article 298 of the of the Constitution. The right of the State to carry on trade or business to the exclusion of others does not arise by virtue of Article 19 (6). The right of the State to carry on trade or business is conferred on the State by entrusting power to enact laws under Entry 21 of List III of the Seventh Schedule and the exercise of that power in the context of fundamental rights is secured from attack by Article 19 (6).<sup>2</sup>

In *Narayanappa v. State of Mysore*,<sup>3</sup> the argument was that the State or a Corporation owned or controlled by the State could carry on a trade, business, industry or service to the exclusion complete or partial of citizens only if the State itself made a law relating to it. The argument was repelled by the Supreme Court. It held that “in any event the expression law as defined in Article 13 (a) includes an Ordinance, Order, bye-law, Rule, Regulation, Notification, Custom etc. The Scheme framed under Section 68-C of the Motor Vehicles Act may properly be regarded as “law” within the meaning of Article 19 (6) made by the State excluding private operators from notified routes or notified area and immune from the attack that it infringed the fundamental right guaranteed by Article 19 (1) (g).

The executive power of the Union and each State under Article 298 of the Constitution extends *inter alia*, to the carrying on of any trade or business. There is nothing in the Article 298 to show that the trade or business carried on by a State must be restricted to the area within its territorial limits. On the contrary the Article envisages the carrying on of the trade or business by a State without any territorial limitations. The only restriction on the executive power of the State in this respect is contained in clause (b) of the provisions to that Article. According to that clause, the executive power of the State shall, in so far as such trade or business is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.<sup>4</sup>

1. *Anraji v. State of Maharashtra*, (1984) 2 SCC 292 (300).

2. *State of Tamil Nadu v. Hind Stone*, 1981 SC 711 (718).

3. (1960) 3 SCR 742 : 1960 SC 1073 ; *State of Tamil Nadu v. Mis Hind Stone*, 1981 SC 711 (718).

4. *Khazan Singh v. State of U. P.*, 1974 SC 669 (673).

Entry 35 in List III of the Seventh Schedule relates to mechanically propelled vehicles. Entry 21 in List III, the Parliament can make laws for commercial and industrial monopolies. The expression commercial and industrial monopolies was wide enough to include grant or creation of commercial and industrial monopolies to the State.<sup>1</sup>

Under sub-section 3 of Section 68-D Motor Vehicles Act was approved by the State Government. In *Khazan Singh* case (supra) it was contended that the State Government in approving the Scheme exercised executive power and such executive power could not operate in areas beyond the territorial limits of the State. Rejecting this contention the Supreme Court said : "A Scheme approved by the State Government effectuates the object of State monopoly in the matter of transport service such a scheme does not entail encroachment by one State Government upon the executive sphere of another State Government. The action taken by the Uttar Pradesh Government in furtherance of the State monopoly in accordance with the statute made by Parliament cannot be struck down on the ground of encroachment upon the executive of the Rajasthan Government."<sup>2</sup>

### 38.2. Government Trading not governmental purpose.

If a State chooses to go into the business of buying and selling commodities : its right to do so may be conceded so far as the Constitution is concerned, but the exercise of the right is not the performance of a governmental function. When the State enters the market place seeking customers it divests itself of its quasi sovereignty protanto, and takes on the character of a trader. There is constitutional line between the State as Government and the state as trader.<sup>3</sup> Chief Justice Marshall said long ago in *Bank of the U. S. v. Panthers Bank*.<sup>4</sup> "It is we think second principle, that when Government becomes a partner in any trading company, it divests itself, so far as concern the transactions of that company, of its sovereign character and takes that of a private citizen". Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates and to the business which is to be transacted".

### 38.3. Trade with Government—Subject to Part III.

The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination.<sup>5</sup>

The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a

1. *N. C. Narayanappa v. State of Mysore*, (1960) 3 SCR 742 : 1960 SC 1073 ; *Khazan Singh v. State of U. P.*, 1974 SC 669 (674).

2. *Khazan Singh v. State of U. P.*, 1974 SC 669 (674).

3. *Ohio v. Helvering*, 79 L ed 1307 (1310).

4. 6 L ed 244.

5. *European Equipment Co., Ltd. v. State of West Bengal*, 1975 SC 266 (268) ; *Radha Krishna Agarwal v. State of Bihar*, 1977 SC 1496.

contract<sup>1</sup> with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.<sup>1</sup>

#### 38.4. *Inviting tenders.*

An open competition tender is the most economical and hence the best means of putting government work out to contract. Some times Departments prefer to limit competitions to a list of approved firms of known capabilities and financial standing which had experience of departmental work. The principles of admission to and exclusion from department approved lists should be such as safeguard the public interest and are fair to contractor. An applicant firm that is refused admission to a department approved list may feel that the refusal is unjustified. Similarly if a person has been black listed he may have a genuine grievance.<sup>2</sup>

#### 38.4. *Citizens have no trade with Government.*

The Government is a government of laws and not of men. It is true that no person has any right to enter into a contract with government but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualification of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.<sup>3</sup>

#### 38.6. *Trading by Government—Principles.*

Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of the sanctions involved therein.<sup>4</sup>

1. *European Equipment Co. Ltd. v State of West Bengal*, 1975 SC 266 (268) : *Radha Krishna Agarwal v State of Bihar*, 1977 SC 1496

\* 2. Colin Turpin : *Government Contracts*, p. 140.

3. *European Equipments Co. Ltd. v. State of West Bengal*, 1975 SC 266 (268).

4. *Ibid.*

**38.7. Blacklisting.**

In passing an order of blacklisting the Government Department acts under what is described as a standardised Code. This is a Code for internal instruction. The Government departments make regular purchases. They maintain list of approved suppliers after taking into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations so warrant or if there is strong justification for believing that the proprietor or employee of the firm has been guilty of malpractices such as bribery, corruption, fraud, or if the firm continuously refuses to return Government dues or if the firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servant. In *European Equipment Co. v. State of West Bengal*<sup>1</sup> the petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending against the petitioners for alleged violation of provisions under the Foreign Exchange Regulation Act.

The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting a person who has been dealing with the government in the matter of sale and purchase of materials has a legitimate interest or expectations. When the State acts to the prejudice of a person, it has to be supported by legality.<sup>2</sup>

The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".<sup>3</sup>

Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put in the blacklist.<sup>4</sup>

1. 1975 SC 266 (469).

2. *European Equipment Co. v. State of West Bengal*, 1975 SC 266.

3. *Ibid.*

4. *Ibid.*, p. 269.



## Executive Power of the Union and of States to make Contracts

### SYNOPSIS

- 39.1. Executive power of the Union and each State extends to the making of contracts.
- 39.2. Contracts made under the Statute.
- 39.3. Contracts with Government.
- 39.4. Implied Contract.
- 39.5. Government not bound to accept higher bid.

#### 39.1. *The executive power of the Union and each State extends to the making of Contracts*

It is in the interest of the public that the question whether a binding contract has been made between the State and a private individual should not be left open to dispute and litigation. The whole aim and object of the Legislature in conferring powers upon the head of the State would be defeated if in the case of a contract which is in form ambiguous, disputes are permitted to be raised whether the contract was intended to be made for and on behalf of the State or on behalf of the person making the contract. This consideration by itself said Shah, J. would be sufficient to imply a prohibition against a contract being effectively made otherwise than in the manner prescribed.<sup>1</sup>

All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

Neither the President nor the Governor shall be personally liable in respect of any Contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.<sup>2</sup>

The executive power of the Union and of each State shall extend, subject to any law made by the appropriate legislature, to the grant, sale deposition or mortgage of any property held for the purposes of the Union or of such State

1. *Bhikraj v. Union of India*, 1962 SC 113 (119).

2. *Constitution of India*, Art. 299.

as the case may be and to the purchase or acquisition of property<sup>6</sup> for those purpose respectively, and to the making of contracts.

All property acquired for the purposes of the Union or of a State shall vest in the Union or in such State as the case may be.<sup>1</sup>

### 39.2. Contract made under a Statute

The intention of the Constitution is not to extend the principles in Article 299 of the Constitution to cover all possible contracts. There is why specific reference has been made to contracts in the exercise of executive power. If a contract is made on behalf of the State in exercise of a statutory power Article 299 has no application.<sup>2</sup> The transference was made under the provision of a Statute.

### 39.3. Contract with Government

It is true that in some cases hardship may result to a person, not conversant with the law, enters into a contract in a form other than the one prescribed by law. It also happens that the Government contracts are sometimes made in disregard of the forms prescribed ; but that would not be a point for holding that a departure from a provision which is mandatory and at the same time salutary may be permitted.<sup>3</sup>

A person who seeks to contract with the Government must be deemed to be fully aware of statutory requirements as to the form in which the contract is to be made. Inadvertance of an officer of the State executing a contract in manner violative of the express statutory provisions ; the other contracting party acquiescing in such violation out of ignorance or negligence will not justify the Courts in not giving effect to the intention of the Legislature.<sup>4</sup>

It is now well established that where a contract between the Dominion of India and a private individual was not in the form required by Section 175 (3) of the Government of India Act, 1935 or Article 299 of the constitution it was void and could not be enforced and therefore the Dominion of India could not be sued by a private individual for breach of such a contract. In *Seth Bikhraj Jaipuria v. Union of India*,<sup>5</sup> it was stated that under Section 175 (3) of the Government of India Act, 1935, the contracts had (a) to be expressed to be made by the Government-General ; (b) to be executed on behalf of the Government-General and (c) to be executed by officers duly appointed in that behalf and in such manner as the Governor-General directed or authorised. The evidence in the case showed that the contracts were not expressed to be made by the Governor-General and were not executed on his behalf. It was held by the Supreme Court that the provisions of Section 175 (3) were mandatory and that the contracts were therefore void and not binding on the Union of India which was not liable for damages for breach of the contracts. The same principle was reiterated by the Supreme Court in a later case-*State of West Bengal v. B. K. Mondal and Sons*.<sup>6</sup> The principle is that the provisions of Section 175 (3) of the Government of India Act, 1935 or the corresponding provisions of Article 299(1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel or ratification in such a case. The

1. Constitution of India, Art. 298 (unamended).

2. *Ajodhya Prasad v. State of Orissa*, 1971 Orissa 158 (162) ; *Excise Licence, State of Mysore v. Dasappa*, (1968) 1 Mysore Law Journal 69 (Excise) ; *Ram Chander v. State of Punjab*, 1969 Punjab 4

3. *Bhikraj v. Union of India*, 1962 SC 113 (119).

4. *Ibid*, p. 122. ; *Mulchand v. State of M. P.*, 1964 SC 1218 (1222).

5. (1962) 2 SCR 880 : 1962 SC 113.

6. (1962) Suppl. (1) SCR 876 : 1962 SC 779.

provisions of Section 175 (3) of the Government of India Act and the corresponding provisions of Article 299 (1) of the Constitution have not been enacted for safeguarding the Government against unauthorised contract. The provisions are embodied in Section 175 (3) of the Government of India Act and Article 299 (1) of the Constitution on the ground of public policy—on the ground of protection of general public—and these formalities cannot be waived or dispensed with. If the plea of the respondent regarding estoppel or ratification is admitted, that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public. That is why the plea of estoppel or ratification cannot be permitted. But if money is deposited and goods are supplied or if services are rendered in terms of the void contract, the provisions of Section 70 of the Indian Contract Act may be applicable. In other words if the conditions imposed by Section 70 of the Indian Contract Act are satisfied then the provisions of that section can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation.<sup>1</sup>

Article 299 of Constitution requires that a contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz, (i) it must be expressed to be made by the President or by the Governor of the State as the case may be; (ii) it must be executed on behalf of the President or the Governor as the case may be and (iii) its execution must be by such person and in such manner as the President or the Governor may direct or authorise. Failure to comply with these conditions nullifies the contract and renders it void and unenforceable.<sup>2</sup>

In *Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram*<sup>3</sup> a contract for the supply of goods had been entered into with the Central Government by the firm Moolji Seeka Company of which the election-candidate Chaturbhuj was a partner. The contract in question had not complied with the mandatory provision of Article 299 of the Constitution and the question which the Supreme Court had to consider was whether in view of the fact that the contract in question had contravened the provisions of the Article. Chaturbhuj could be said to be disqualified for being chosen as a member of Parliament by virtue of the disqualification set out in section 7 (d) of the Representation of People Act 43 of 1951. Bose, J. speaking for the Court said: "We feel that some reasonable

1. *Mulam Chand v. State of M. P.*, 1968 SC 1218 (1222).

2. *Bihar Eastern Coop. Society v. Sepahl Singh*, 1977 SC 2149 (2153); *State of Bihar v. Karam Chand*, (1962) 1 SCR 827; 1962 SC 110; *Bhikhranjai Jaipuria v. Union of India*, (1962) 2 SCR 840; 1962 SC 113; *State of W. B. v. B. K. Mondal and Sons* (1962) Supp 1 SCR 876; 1962 SC 779.

3. 1954 SC 236.

meaning must be attached to Article 299 (1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of the Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts, probably by far the greatest in numbers, which though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. If not, its interest are safeguarded as we think the Constitution intended that they should, be. It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of paltry nature, and sometimes in our emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form.

In *Chaturbhuj* case, Bose, J. in dealing with a case of disqualification under the Representation of People Act, 1951 resulting from a contract with the State which was not executed in the form and manner prescribed by Article 299 observed :

“It may be that Government would not be bound by the contracts in that case but that was a very different thing from saying that the contracts as such was void and of no effect. It only mean that the principal cannot be sued: but we take it there would be nothing to prevent ratification especially if that was for the benefit of Government, we accordingly hold that the contracts in question here was not void simply because the Union Government could not have been sued on them by reason of Article 209 (1)”

In *Bhikraj v. Union of India*<sup>1</sup> and again in *State of West Bengal v. B. K. Mandal and Sons*<sup>2</sup> the Supreme Court held that the decision in the case of *Chaturbhuj*<sup>3</sup> did not support the proposition that notwithstanding the failure of the parties to comply with Article 299 (1) the Contract would not be invalid.

The making of the contract is not independent of the form in which it is executed. The document evidencing the contract is the sole repository of its terms and it is by the execution of the contract that the liability ex contractu of either party arises.<sup>4</sup> The principle of *J. K. Gas Plant Manufacturing Co's* case<sup>5</sup> would, therefore, have no application in the interpretation either of Section 175 (3) of the Government of India Act, 1935 or of Art. 299 of the Constitution.

Article 299 does not in terms require that a formal document executed on behalf of the Government and the other contracting party alone is effective. In the absence of any direction by the President or the Governor prescribing the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled. It is true that Article 299 uses the expression executed, but that does not by itself contemplate execution of a formal document by the

1. 1962 SC 113.

2. 1962 SC 779.

3. 1954 SC 236.

4. *Bhikraj v. Union of India*, 1962 SC 113 (122).

5. 1947 FCR 141 : 1947 FC 38.

contracting parties. In *Union of India v. Rallia Ram*,<sup>1</sup> a tender notice was issued by the Government of India, Department of Food Division in the name of Chief Director of purchases. He agreed to sell the good incorporated in the acceptance note which also headed "Government of India Department of Food". On these facts the Supreme Court held that correspondence between the parties ultimately resulting in the acceptance note amounted to a contract expressed to be made by the Government though in the acceptance note it was not expressly stated that the contract was executed on behalf of the Governor-General. On a fair reading of the contents of the letter in the light of the obligations undertaken thereunder it was held that the contract was executed on behalf of the Governor General. In *Davecos Garments Factory v. State of Rajasthan*,<sup>2</sup> it was common ground that the agreement was expressed to be made by the Governor of Rajasthan and that the Inspector General of Police had been duly authorised to execute the same on his behalf. The sole objection was to the form of execution inasmuch as it was not stated in so many words that the Inspector General of Police had signed the agreement on behalf of the Governor. It was held that the agreement had fully complied with the requirement of Article 299. But in *Karamshri v. State of Bombay*,<sup>3</sup> the letters mentioned the name of the Minister of the P.W.D. and also of the Government, in the context of the rates that might be fixed thereafter but the said documents did not purport to emanate from the Governor. At least they were issued under the directions of the Minister. The Supreme Court held that the contract was void as it had not complied with the provisions of Section 175 (3).

In *Union of India v. N. N. P. Ltd.*,<sup>4</sup> the correspondence showed that the formalities necessary for a concluded contract had been satisfied and the parties were *ad idem* by the time the letter of acceptance was written but the Supreme Court held that there was no valid or binding contract because the letter of acceptance was not by a person authorised to execute the contracts for and on behalf of the President of India.

Neither Section 175 (3) of the Government of India Act, 1935 nor Article 299 of the Constitution presents any particular mode in which authority must be conferred. Normally, no doubt, such conferment will be by notification in the official gazette, but there is nothing in Section 175 or in Art. 299 to preclude authorisation being conferred *ad hoc* on any person and when that is established, the requirement of these provisions is satisfied.<sup>5</sup> In *State of Bihar v. Karamchand Thapar* an agreement to refer to arbitration on behalf of the Government of Bihar was executed by the Executive Engineer whereas by the notification issued by the Government of Bihar under Section 175 (3) all instruments in that behalf had to be executed by the Secretary or the Joint Secretary to the Government. The Court on a consideration of the correspondence produced in the case held that the Executive Engineer had been specially authorised by the Governor acting through his Secretary to execute the agreement. In *Bhikraj v. Union of India*,<sup>6</sup> the Supreme Court held that the High Court was in error in holding that the authority to execute the contract could only be guaranteed by the Governor-General by rules expressly promulgated in that behalf or by formal notification.

1. 1963 SC 1685 (1690).

2. 1971 SC 141.

3. 1964 SC 1714.

4. 1972 SC 915.

5. *State of Bihar v. Karam Chand Thapar*, 1962 SC 110 (112).

6. 1962 SC 113.]

7. *K. P. Chaudhry v. State of M. P.*, 1967 SC 203 (206).

### 39.4. Implied Contract.

In view of Article 299 (1) of the Constitution there can be no implied contract between the Government and another person, the reason being that if such implied contracts between the Government and another person were allowed, they would in effect make Article 299 (1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299 (1) could get away by saying that an implied contract may be inferred on the facts and circumstances of a particular case. This is of course not to say that if there is a valid contract as envisaged by Article 299(1), there may not be implications arising out of such a contract.<sup>1</sup>

If the contract between Government and another person is not in full compliance with Article 299 (1) it would be no contract at all and would not be enforced either by the Government or by the other person as a contract. In the *K.P. Chaudhry's* case it was not in dispute that there never was a contract as required by Art. 299 (1) of the Constitution. Nor can the fact that the appellant bid at the auction and signed the bid sheet at the close thereof or signed the declaration necessary before he could bid at the auction amount to a contract between him and the Government satisfying all the conditions of Article 299(1). The position therefore was that there was no contract between the appellant and the Government before he bid at the auction, nor was there any contract between him and the Government after the auction was over as required by Article 299 (1) of the Constitution. Further in view of the mandatory terms of Article 299 (1) no implied contract could be spelled out between the Government and the appellant at the stage of binding for Article 299 in effect rules out all implied contracts between Government and another person.<sup>2</sup>

In the functioning of the vast organisation represented by a modern State Government Officers have invariably to enter into a variety of contracts which are often of a petty nature. Sometimes they may have to act in emergency, and on many occasions, in the pursuit of the welfare policy of the State Government Officers may have to enter into contract orally or through correspondence without strictly complying with the provisions of Section 175 (3) of the Government of India, 1935 or Art. 299 of the Constitution. If, in all these cases what is done in pursuance of the contracts is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper, Section 70 of the Indian Contract Act, 1872 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contracts had not been made as required by Section 175 (3) or Art 299 of the Constitution. If it was held that Section 70 was inapplicable in regard to such dealings by Government Officers it would lead to extremely unreasonable consequences and may even hamper, if not wholly bring to a standstill the efficient working of the Government from day to day. "We are referring to this aspect of the matter not with a view to detract from the binding character of the provisions of Section 175 (3) of the Act but to point out that like ordinary citizens even the State Government is subject to the provisions of Section 70, and if it has accepted the things delivered to it or enjoyed the work done for it, such acceptance and enjoyment would afford a valid basis for claims of compensation against it."<sup>3</sup>

There is no doubt that the thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on

1. *State of W. B. v. B. K. Mondal and Sons*, 1962 SC 779 (789).

2. *Ibid.*

3. *Ibid.*, p. 788.

others' services not desired by them. Section 70 deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. Therefore, the acceptance and enjoyment of the thing delivered or done which is the basis for the claim for compensation under Section 70 must be voluntary. It would thus be noticed that this requirement affords sufficient and effective safeguard against spurious claims based on unauthorised acts. It was said "If the act done by the respondent was unauthorised and spurious the appellant could have easily refused to accept the said act and then the respondent would not have been able to make a claim for compensation. It is unnecessary to repeat that in cases falling under Section 70 there is no scope for claims for specific performance or for damages for breach of contract. In the very nature of things claims for compensation are based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of contract."<sup>1</sup>

In regard to the claim made against the Government of a State under Section 70 it may be that in many cases the work done or the goods delivered are the result of a request made by some officer or other on behalf of the said Government. In such a case the request may be ineffective or invalid for the reason that the officer making the request was not authorised under Section 175 (3), or, if the said officer was authorised to make the said request the request becomes inoperative because it was not followed up by a contract executed in the manner prescribed by Section 175 (3). In either case the thing has been delivered or the work has been done without a contract and that brings in Section 70. A request is thus not an element of Section 70 at all though the existence of an invalid request may not make Section 70 inapplicable. An invalid request is in law no request at all, and so the conduct of the parties has to be judged on the basis that there was no subsisting contract between them at the material time.<sup>2</sup>

All that the word "lawfully" in the context indicates is that after something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of Section 70 gives rise to a claim for compensation.<sup>3</sup>

### 39.5. *Government not bound to accept the highest bid.*

In *State of Orissa v. Hari Narain Jaiswal*,<sup>4</sup> one of the contentions raised was that the power retained by the Government 'to accept or reject, any bid without any reason therefor, was an arbitrary power violative of Arts. 14 and 19 (1) (g). The contention was negatived and Hegde, J. said: "It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19 (1) (g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privilege set out in Section 22 was not denied. It was also not disputed that these privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell

1. *State of West Bengal v. B. K. Mondal and Sons*, 1962 SC 799 (788).

2. *Ibid.*, p. 788.

3. *Ibid.*, p. 788.

4. (1972) 2 SCC 36 : 1972 SC 1816 (1822).

them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. The Government is not bound to accept the tender of the person who offered the highest amount and if the Government rejected all the bids made at the auction, it did not involve any violation of Article 14 or 19 (1)(g)."

The decision in *P. R. Quenin v. M. K. Tandel*,<sup>1</sup> merely reiterates the principle laid down in earlier decisions in *Trilochan Mishra v. State of Orissa*,<sup>2</sup> and *State of Orissa v. Herinarayan Jaiswal*<sup>3</sup> and points out that a condition that the Government shall be at liberty to accept or reject any bid without assigning any reason therefor is not violative of Article 14 and that 'in matters relating to contracts with the Government the latter is not bound to accept the tender of the person who offered the highest amount'. Nowhere does it say that such a condition permits the Government to act arbitrarily in accepting a tender or that under the guise or pretext of such a condition, the Government may enter into a contract with any person it likes, arbitrarily and without reason. In fact the Court pointed out that the act of Government was not 'shown to be vitiated by such arbitrariness as should call for interference by the Court' recognising clearly that if the rejection of the tender of respondent 1 were arbitrary, the Court would have been justified in striking it down as invalid."

In *Trilochan Mishra v. State of Orissa*,<sup>4</sup> the complaint was that the bids of persons making the highest tenders were accepted and persons who had made lesser bids were asked to raise their bids to the highest offered before their bids were accepted.

"Negating the complaint" Mitter, J. said, "Thus there was no loss to Government and merely because the Government preferred one tender to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration, to be preferred to the higher tenderer."

The Government may reject a higher tender and accept a lower one only when there is valid reason to do so, as for example where it is satisfied that the person offering the lower tender is on an overall consideration preferable to the higher tenderer. There must be some relevant reason for preferring one tenderer to another, and if there is, the Government can certainly enter into contract with the former even though his tender may be lower but it cannot do so arbitrarily or for extraneous reasons.<sup>5</sup>

1. (1974) 2 SCC 169.

2. 1971 SC 733.

3. 1972 SC 1816.

4. (1971) 3 SCC 153 : 1971 SC 733.

5. *R. D. Shetty v. International Airport Authority*, (1979) 3 SCC 489 (515).



## Governmental Liability

### SYNOPSIS

- 40.1. Statute binding on State
- 40.2. Promissory Estoppel.
- 40.3. Illegal and Tortious acts..
- 40.4. Reason for nonsuability of State.
- 40.5. Suability of the United States of America.
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- 40.7. Tortious liability of the State.
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#### 40.1. Statute binding of State

In *Director Rationing and Distribution v. Corporation of Calcutta*<sup>1</sup> the majority judgment held that the law applicable to India before the Constitution was authoritatively laid down in the *Province of Bombay v. Municipal Corpn. of Bombay*<sup>2</sup> and the Constitution has not made any change in the legal position and that on the other hand it has clearly indicated that laws in force before January 26, 1950, shall continue to have validity even in the new set up except in so far as they were in conflict with the express provisions of the Constitution. The majority also held that the rule of interpretation of statute that the State was not bound by a statute unless it so provided in express terms or by necessary implication was still good law. Wanchoo, J. (as he then was) in his dissenting opinion, however, held that the rule of construction which was based on the royal prerogative as known to the common law of England could not be applied to India now that there was no Crown in India and when the common law of England was not applicable the State was bound by a statute unless it was exempted expressly or by necessary implication. The rule in that decision is no longer good law. In *Supdt. and Legal Remembrancer, West Bengal v. Corporation of Calcutta*.<sup>3</sup> the Supreme Court considered the correctness of that decision and disagreeing with the majority view accepted as correct the minority opinion. The Court held that

- 1. (1961) 1 SCR 158 : 1960 SC 1355.
- 2. 73 Ind. App. 271 : 1947 PC 34.
- 3. (1967) 2 SCR 170 : 1967 SC 997.

common law rule of construction that the Crown was not unless expressly named or clearly intended, bound by a statute was not accepted as a rule of construction throughout India and even in the Presidency Towns it was not regarded as an inflexible rule of construction. It was not statutorily recognised either by incorporating it in different Acts or in any General Clauses Act; at the most it was relied upon as a rule of general guidance in some parts of the country. The legislative practice established that the various legislatures of the country provided specifically exemptions in favour of the Crown whenever they intended to do so indicating thereby that they did not rely upon any presumption but only on express exemptions. The Court also observed that the Privy Council in *Province of Bombay v. Municipal Corp.*<sup>1</sup> gave its approval to the rule mainly on concession made by counsel. The Court then held that the archaic rule based on the prerogative and perfection of the Crown could have no relevance to a democratic republic; that such a rule was inconsistent with the rule of law based on the doctrine of equality and introduced conflicts and anomalies. Therefore, the normal construction, that an enactment applies to citizens as well as to the State unless it expressly or by necessary implication exempted the State from its operation, steered clear of all anomalies and was consistent with the philosophy of equality enshrined in the Constitution. The position now therefore is that a statute applies to State as much it does to citizen unless it expressly or by necessary implication exempts the State from its operation.<sup>2</sup>

#### 40.2. Promissory Estoppel

The doctrine of promissory estoppel has been applied against the Government and the defence based on executive necessity has been negated.

*Indo-Afghan Agencies Ltd.*<sup>3</sup> who were the respondents before the Supreme Court, acting in reliance on the Export Promotion Scheme issued by the Central Government, exported woollen goods to Afghanistan and on the basis of their exports claimed to be entitled to obtain from the Textile Commissioner import entitlement certificate for the full *f. o. b.* value of the goods exported as provided in the scheme. The Scheme was not a statutory scheme having the force of law but it provided that an exporter of woollen goods would be entitled to import raw material of the total amount equal to 100% of the *f. o. b.* value of his exports. The respondents contended that, relying on the promise contained in the Scheme, they had exported woollen goods to Afghanistan and were, therefore, entitled to enforce the promise against the Government and to obtain import entitlement certificate for the full *f. o. b.* value of the goods exported, on the principle of *promissory estoppel*. This contention was sought to be answered on behalf of the Government by pleading the doctrine of executive necessity and the argument of the Government based on this doctrine was that it is not competent for the Government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arose and no promise or undertaking can be held to be binding on the Government so as to hamper its freedom of executive action.

Shah, J. speaking on behalf of the Court observed: "We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set up no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seek to deprive a citizen of his right or liberty otherwise than

1. 73 Ind. App. 271 : 1947 PC 34.

2. *Union of India v. Jubbi*, 1968 SC 360 (362).

3. *Union of India v. Anglo-Afghan Agencies*, 1968 SC 714; *M. P. Sugar Mills v. State of U. P.*, 1979 SC 621 (642).

in exercise of power derived from the law—common or statute—the Courts will be competent to and indeed would be bound to, protect the rights of the aggrieved citizen”.<sup>1</sup>

The defence of executive necessity was thus clearly negated by the Supreme Court and it was pointed out that it did not release the Government from its obligation to honour the *promise* made by it, if the citizen, acting in reliance on the promise, had altered his position. The doctrine of promissory estoppel was in such a case applicable against the Government and it could not be defeated by invoking the defence of executive necessity.<sup>2</sup>

It was also contended on behalf of the Government that if the Government were held bound by every representation made by it regarding its intention when the exporters have acted in the manner they were invited to act, the result would be that the Government would be bound by a contractual obligation even though no formal contract in the manner required by Article 299 was executed. But this contention was negated and it was pointed out by the Court that the respondents : “are not seeking to enforce any contractual right : they are seeking to enforce compliance with the obligation which is laid upon the Textile Commissioner by the terms of the Scheme, and the view that even if the Scheme is executive in character, the respondents who were aggrieved because of the failure to carry out the terms of the Scheme were entitled to seek resort of the Court and claim that the obligation imposed upon the Textile Commissioner by the Scheme be ordered to be carried out”.

It was thus laid down that a party who has, acting in reliance on a promise made by the Government, altered his position, is entitled to enforce the promise against the Government even though the promise was not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government.

The Supreme Court finally, after referring to the decisions in the *Ganges Mfg. Co. v. Surujnul*.<sup>3</sup> *Municipal Corporation of the City of Bombay v. Secy. of State for India*<sup>4</sup> and *Collector of Bombay v. Municipal Corporation of the City of Bombay*,<sup>5</sup> summed up the position as follows ; “Under our Constitution Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex party appraisalment of the circumstances in which the obligation has arisen”.

The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the government would be bound by the promise and the promise would be enforceable against the government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Art. 293 of the Constitution.<sup>6</sup>

1. *M. P. Sugar Mills v. State of U.P.*, 1979 SC 621 (643).

1. *Union of India v. Anglo-Afghan Agencies*, 1979 SC 718 (723).

3. (1980) 1LR 5 Cal 669.

4. (1905) 1LR 29 Bombay 580.

5. 1951 SC 469.

6. *M. P. Sugar Mills v. State of U.P.*, 1970 SC 621 (643).

But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promise and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to be required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J. pointed out in the *Indo-Afghan Agencies* case, claim to 'be exempt from the liability to carry out the promise on some indefinite and undisclosed ground of necessity or expediency', nor can the Government claim to be the sole judge of its liability and repudiate it "on an ex parte appraisal of the circumstances." If the Government wants to resist the liability, it will have to disclose to the Court what are the subsequent events on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those events were such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability; the Government would have to show what precisely is the changed policy and also its reason and justification so the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, the overriding public interest requires that the Government should be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere *ipse dixit* of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promise could become final and irrevocable.

It may also be noted that *promissory estoppel* cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power. The Legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel.<sup>1</sup>

1. *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd.*, [(1974) 1 SCR 671 : 1973 SC 2734. ; *M. P. Sugar Mills Ltd. v. State of U. P.*, 1979 SC 621 (647).

In *Indo-Afghan Agencies's*<sup>1</sup> case reliance was placed on the observation of Lord Denning in *Robertson v. Minister of Pensions*.<sup>2</sup> "The crown can not escape by saying that as estoppel does not bind the Crown for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that Crown can not bind itself so as to fetter its future executive action.

Lord Denning was dealing with a case of a serving army officer who wrote to the War Office regarding a disability and received a reply that his disability had been accepted as attributable to "military service". Relying on that assurance, he forebore to obtain an independent medical opinion. The Minister of Pensions took the view that appellant's disability could not be attributed to war service. Lord Denning held that between the subjects such an assurance would be enforceable because it was intended to be binding, intended to be acted upon, and it was in fact acted upon; and the assurance was also binding on the Crown because no term could be implied that the Crown was at liberty to revoke it.<sup>3</sup>

The correctness of the case came up for consideration before the House of Lords in *Howell v. Falmouth Boat Construction Co., Ltd.*<sup>4</sup> The appeal was preferred to the House of Lords from the Court of Appeal against the judgment of Bucknil, Singleton and Denning, L. JJ. In his judgment in the Court of Appeal Denning L. J. pressed the principle in the following terms :—

"Whenever Government Officers in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume. He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it. That was the principle which I applied to *Robertson v. Minister of Pensions*,<sup>5</sup> and it is applicable in this case also".

Commenting on the view taken by Denning, L. J. Lord Simonds observed : "My Lords, I know of no such principle in our law nor was any authority for it cited. The illegality of act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy..... The question is whether the character of an act done in face of statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority. In my opinion, the answer is clearly, No. Such an answer may make more difficult the task of the citizen who is anxious to walk in the narrow way, but that does not justify a different answer being given."

Lord Normand referred to the principle laid down by Denning, L.J., observed : "As I understand this statement, the respondents were in the opinion of the learned Lord Justice, entitled to say that the Crown was barred by representations made by Mr. Thomson and acted on by them from alleging against them a breach of the statutory order, and further that the respondents were equally entitled to say in a question with the appellant that there had been no breach but it is certain that neither a Minister nor any subordinate officer of the Crown can by any conduct or representation bar the crown enforcing a statutory

1. 1968 SC 718.

2. (1949) 1 KB 227.

3. *Jit Ram v. State of Haryana*, 1980 SC 1278 ; *Robertson v. Minister of Pension*, (1949) 1 KB 227.

5. 1951 AC 837.

5. •(1949) 1 KB 227.

prohibition or entitle the subject to maintain that there has been no breach of the contract.”

The decisions of the English Court referred to above clearly indicate that the English Courts did not accept the view of Denning, J., in *Robertson v Minister of Pensions*.<sup>1</sup> The House of Lord in *Howell v. Falmouth Boat Construction Co Ltd.*,<sup>2</sup> disagreed with the view of Lord Denning, J. holding that there could not be an estoppel against express provision of the law nor could that State by its action waive its rights to exercise powers entrusted to it for the public good. The Privy Council in *Antonio Buttigieg's case*<sup>3</sup> approved the view of Rowlatt, J. in *Roderiaktiebolaget Amphitrite v. King*<sup>4</sup> with which Denning, J. did not agree.

In *Century Spinning and Manufacturing Co. Ltd. v. The Ulhasnagar Municipality*,<sup>5</sup> the facts of the case may be briefly stated. The State of Maharashtra on the representation made by certain manufacturers proclaimed the exclusion of the Industrial Area from the Municipality jurisdiction. The Municipality made representations to the State requesting that the proclamation be withdrawn, agreeing to exempt the factories in the industrial area from payment of octroi from the date of levy. The State acceded to the request of the Municipality. The appellants expanded their activities relying on the Municipality's assurance. The Maharashtra Municipalities Act was enacted and the Municipality took over the administration. Thereafter, the Municipality sought to levy octroi duty on the appellant amounting to about Rs. 15 Lacs per annum.

A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the agreement shall be in a certain form, no contract may result from the representation and acting thereupon but the law is not powerless to raise in appropriate cases an enquiry against him to compel performance of the obligation arising out of representation.

The Court after considering the *Indo-Afghan*, case and *Howell's*<sup>6</sup> case, expressed thus : “If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry its obligation arising out of representation made by it relying upon which a citizen has altered his position to his prejudice”.

The law laid down by the House of Lord in *Howell's* case has been accepted as correct by the Court in a recent decision of the Court by a Bench of four Judges, in *Excise Commissioner U. P. Allahabad v. Ram Kumar*.<sup>7</sup> The respondents before the Court were the highest bidders in an auction for exclusive manufacture and selling of liquor in the State of U. P. Before holding the auction, the rates of excise duty and prices of different varieties of country liquor and also the conditions of licence were announced. No announcement was made as to whether the exemption from sales tax in respect of sale of

1. (1949) 1 KB 227.

2. 1951 AC 837.

3. 1947 PC 29.

4. (1921) 3 KB 500.

5. (1970) 3 SCR 854 : 1971 SC 1021.

6. 1951 All ER 278.

7. (1976) Supp. SCR 532 : 1976 SC 2237.

country liquor granted by the notification dated 6-4-1959 was or was not likely to be withdrawn. On the day following the day when the licences were granted the Government of U. P. issued a notification under sections 3-A and 4 of U.P. Sales Tax Act, 1948 superseding the earlier notification exempting the payment of sales tax and imposing sales tax on the turnover in respect of country liquor at the rate of 10 paise per rupee. The respondents challenged the validity of the notification issued under the Sales Tax Act on the ground that the State Government did not announce at the time of the earlier auction that the earlier notification was likely to be withdrawn. The Court on a consideration of the question whether the State Government was estopped from levying the Sales Tax after referring the earlier decisions of the Supreme Court that the State Government was not estopped or precluded from subjecting the sales of liquor to tax if it felt impelled to do so in the interest of revenue of the State. The Court followed two earlier decisions of the Supreme Court viz. *M. Ramanathan Pillai v. State of Kerala*,<sup>1</sup> and *State of Kerala v. The Gwalior Rayon Silk Mfg. and Co. Ltd.*,<sup>2</sup> in *Ramnathan Pillai's*<sup>3</sup> case, Ray, C. J., while dealing with the question whether the government has a right to abolish a post in the service, observed that the power to create or abolish post was not related to the doctrine of pleasure. It is a matter of Governmental policy. Every sovereign government has this power in the interest and necessity or internal administration. The creation or abolition of a post was dictated by policy decision, exigencies of circumstances and administrative necessity. The creation, the continuance about the abolition of post was all decided by the government in the interest of administration, and general public. The learned Chief Justice observed that the estoppel alleged by the appellant was on the ground that he entered into an agreement and thereby changed his position to his detriment. The High Court rightly held that the courts exclude the operation of the doctrine of stoppel when it is found that the authority against whom stoppel is pleaded has owed a duty to the public whom the estoppel can not fairly operate.<sup>3</sup>

In *State of Kerala v. Gwalior Rayon Silk Mfg. Co. Ltd.*,<sup>4</sup> Palekar, J. who delivered the opinion with which Krishna Iyer, J. and Bhagwati, J. agreed, rejected the contention that an agreement into by the government with the parties, excluded the legislation on the subject. The plea of equitable estoppel was put forward on the ground that the company established itself in Kerala for the production of Rayon Cloth Pulp on an understanding that the government would bind itself to supply the raw material. Later government was unable to supply the raw material and by an agreement under took not to legislate for the acquisition of private forest for a period of sixty years if the company purchased forest land for the purpose of its supply of raw materials, accordingly the company purchased thirty thousand acres of private forests from the Nilbhuri Kovila Khanna estate for rupees seventy five lacs and, therefore it was argued that the agreement would operate as equitable estoppel against the state. The Supreme Court agreed with the High Court that the surrender by the government of its legislative powers to be used for the public good can not avail the company or operate against the government as equitable estoppel.<sup>5</sup>

In *Excise Commisssioner, U. P., Allahabad v. Ram Kumar*,<sup>6</sup> the Court after consideration of the case law on the subject, held that it was settled by a catena of cases that there could be no question of estoppel against the legislative and sovereign functions.

1. 1973 SC 2641.

2. 1973 SC 2734.

3. *Jit Ram Shiv Kumar v. State of Haryana*, 1980 SC 1285 (1299).

4. 1973 SC 2734.

5. *Jit Ram Shiv Kumar v. State of Haryana*, 1980 SC 1285 (1299).

6. 1976 SC 2237.

In *Moti Lal Padmapat Mills Co. (P) Ltd. v. State of Uttar Pradesh*,<sup>1</sup> it has been held that there can be no promissory estoppel against the exercise of legislative power and the legislature cannot be precluded from exercising its legislative functions by resort to the doctrine of promissory estoppel. It was held that where the Government owed a duty to the public to act differently, promissory estoppel could not be invoked to prevent the Government from doing so. The doctrine cannot be invoked from preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the acts of its officers and agent, who act beyond the scope of their authority. A person dealing with an agent of Government must be held to have noticed all the limitations of his authority.<sup>2</sup>

The whole subject was examined by a Bench of the Supreme Court, Fazal Ali, J. and Kailasham, J. and they summed up the law.

(1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.

(2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.

(3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorized acts of his officers.

(4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on the representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The Officer cannot arbitrarily act on his mere whim and ignore his promise on some defined and undisclosed ground of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.

(5) The officer would be justified in changing the terms of agreement to the prejudice of the other party on special consideration such as difficult foreign exchange position or other matters which have a bearing on general interest of his State.<sup>3</sup>

Their Lordship did not accept some of the observation of Bhagwati, J. made in *Motilal Padmpat Sugar Mills Co. Ltd. v. State of Uttar Pradesh*.<sup>4</sup>

In *Moti Lal Kamplapat Sugar Mills v. State of U. P.*<sup>5</sup> the representation was made by the Government knowing or intending that it would be acted on by the appellant, because the appellant had made it clear that it was only on account of the exemption from sales tax promised by the Government that the appellant had decided to set up the factory for manufacture of vanaspati at Kanpur. The appellant, in fact, relying on this representation of the Government, borrowed moneys from various financial institutions, purchased plant and

1. 1979 SC 621 ; *Jit Ram Shiv Kumar v. State of Haryana*, 1980 SC 1285 (1302).

2. *Jit Ram Shiv Kumar v. State of Haryana*, 1980 SC 1285 (1302).

3. *Ibid.* p. 1302.

4. 1979 SC 621.

5. 1979 SC 621.



machinery from M/s De Smith (India) Pvt. Ltd. Bombay and set up a vanaspati factory at Kanpur. The facts necessary for invoking the doctrine of promissory estoppel were, therefore, clearly present and the Government was bound to carry out the representation and exempt the appellant from sales tax in respect of sales of vanaspati effected by it in Uttar Pradesh for a period of three years from the date of commencement at the production.

It is not necessary, in order to attract the applicability of the doctrine of promissory estoppel that the promisee, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise. This position was impliedly accepted by Denning, J., in the *High Trees*<sup>1</sup> case when the learned Judge pointed out that the promise must be one, "which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person whom it was made and which was in fact acted on"

If a promise is 'acted on' "such action, in law must necessarily result in an alteration of position". This was reiterated by Lord Denning in *W. J. Alan & Co. Ltd. v. El Nasr Export and Import Co.*<sup>2</sup> where the learned Law Lord made it clear that alteration of position "Only means that he (the promisee) must have been led to act differently from what he would otherwise have done. And, if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one should have acted on the belief induced by the other party".

What is necessary, therefore, is no more than that there should be alteration of position on the part of the promisee. The alteration of position need not involve any detriment to the promisee. If detriment were a necessary element, there would be no need for the doctrine of promissory estoppel because, in that event, in quite a few cases, the detriment would form the consideration and the promise would be binding as a contract. There is in fact not a single case in England where detriment is insisted upon as a necessary ingredient of promissory estoppel.

"We do not think that in order to invoke the doctrine of promissory estoppel it is necessary for the promisee to show that he suffered detriment as a result of acting in reliance on the promise. But we may make it clear that if by detriment we mean injustice to the promisee which would result if the promisor were to recede from his promise, then detriment would certainly come in as a necessary ingredient. The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise, but the prejudice which would be caused to the promisee if the promisor were allowed to go back on the promise."

It would, therefore, be correct to say that in order to invoke the doctrine of promissory estoppel it is enough to show that the promisee has, acting in reliance on the promise, altered his position and it is not necessary for him to further show that he has acted to his detriment.<sup>3</sup>

#### 40.3. *Illegal and Tortious acts*

If the taking of the property is in itself illegal it would be a tort committed by the officers of the Government.

In *Tarucknath v. Collector of Hooghly*,<sup>4</sup> Macpherson, J. said : "A Magistrate's ideas of what is for the public convenience in no degree justify him

1. (1955) 1 All ER 256.

2. (1972) 2 All FR 127 (149).

3. *M. P. Sugar Mills v. State of M. P.*, 1979 SC 621 (649).

4. 13 WR 11 (18).

in appropriating or destroying the property of other persons, except in such manner as the law provides. If the Government has a right to make a road through my house and garden, of course, that right may be enforced. But the mere fact that the government considers that it would be a very great convenience to the public that there should be a road running where my house now stands, gives the Government right whatever summarily to appropriate my garden and pull my house down about my ears. The Government and the officers of Government are just as much found to proceed in such matters according to law, as are private individuals; and the government and its officers are just as much liable in damages, for illegally appropriating or destroying property for the purpose of adding to the convenience of the public, as is a private individual who appropriates or destroys property for his own convenience".<sup>1</sup>

In so far as the state activities have wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment.

"What is done in contravention of a provision of an Act of Parliament, cannot be made the subject matter of an action". These are the words used by Lord Ellenborough, C. J., in *Langton v. Hughes*,<sup>2</sup> and they have been cited with approval by the highest authority. They are equally applicable to what is done in contravention of a regulation lawfully made under the authority of an Act of Parliament and an order lawfully made under the authority of such a regulation. That which is prohibited can not be lawfully be done, whether the prohibition is contained in Act or regulation or order, and if it can not lawfully be done it can not be the subject of a claim enforceable at law.<sup>3</sup>

#### 40.4. Reasons for nonsuability of State

A Sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

"As there is no person in the Government who exercises supreme executive power or performs the public duties of a Sovereign it is difficult to see on what solid foundation or principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our Courts as a part of the general doctrine that the supreme power in every state, whenever it may reside, shall not be compelled by process of Court of its own creation, to defend itself from assaults in those Courts."

#### 40.5. Suability of the United States of America

It is necessary to ascertain on what principle the exemption of the United States from a suit by one of its citizens, is founded and what limitation surround that exemption. The subject was examined in some detail by Miller, J, in *United States v Lee*<sup>4</sup> wherein he observed: "In this as in most other cases of like character, it will be found that the doctrine is derived from the

1. *Tarunath v. Collector of Hoogly*, 13 WR 11 (18).

2. 1 M and S 593.

3. *Howell v. Fulmouth Boat Construction Ltd.*, (1951) 2 All ER 278 (280); (1957 AC.

4. 27 Led. 171 (176).

laws and practices of our English ancestors; and while it is beyond question that, from the time of Edward I until now, the King of England was not suable in the Courts of that Country, except where his consent had been given or petition of right, it is a matter of great uncertainty whether prior to that time he was not suable, in his own Courts and in his Kingly character, as other persons were. It is certain, however, that after the establishment of the Petition of Right, about that time, as the appropriate manner of seeking relief where the ascertainment of the parties rights required a suit against the King, no attempt had been made to sue the King in any Court, except as allowed on such petition." There is in this country, however, no such thing as the Petition of Right, as there is no such thing as a Kingly head to the Nation nor to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued, except in the law making power, which may give such consent on the term it may chose to impose. (Congress has created a Court on which it has authorised suits to be brought against the USA but has limited such suits to those arising on contract, with a few a unimportant exception. What were the reasons which forbade that the King should be sued in his own Court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the King, one reason given by old Judges, was the absurdity of the King sending of writ to himself to command the King to appear in the Kings court. No such reason exists in our Government as process runs in the name of the President and may be served on the Attorney General. Nor can it be said that the dignity of the Government is degraded by appearing as defendants in the Court of its own creation. Gray, J. in *Briggs v The Light Boots*<sup>1</sup> observed: "The broader reason is that it would be inconsistent with the very idea of supreme executive power and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as matter of right, at the will of any citizen, and to submit to the Judicial tribunals the control and disposition of his public property, his instruments and his means of carrying on his Government in war and in peace and the money in his treasury."

#### 40.6. Suits against Government under the Constitution

The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of power conferred by their Constitution, sue or be sued in relation to their respective affairs on the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued as if this Constitution had not been enacted.<sup>2</sup> Immediately before the commencement of the Indian Constitution the provision of law in force was section 176<sup>3</sup> as adapted by the India (Provisional Constitution) Order, 1947. It enacted that: "The Dominion may sue or be sued by the name of the Province and may subject to any provisions which may be made by Act of the Dominion Legislature or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by the Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

1. 11 Allen 162.

2. Art. 390 of the Constitution.

3. *Government of India Act, 1935.*

It thus becomes necessary to trace the history of this section. By the Charter Act of 1833(3 & 4 Will IVc 85) the East India Company was made<sup>a</sup> a trustee for the Crown in respect of all the property which it possessed in India and with regard to all the debts and liabilities of the Company they were charged upon the revenues of India. When the Indian territories were transferred to the Crown, the Act of 1858 (21 & 22 Vic.c. 106) was passed and section 65 of that Act provided that the Secretary of State for India in Council should and might sue and be sued as a body corporate and that all persons should and might have and take the same suits and remedies and proceedings, legal and equitable against the Secretary of State Council of India as they could have done against the said company, and that the property and effects then vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes should be subject and liable to the same judgements and executions as they would, while vested in the said company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said company. Section 32 of the Government of India Act of 1915.<sup>1</sup> Continued the same position. Section 32 (1) provided that the Secretary of State in Council might sue and be sued by the name of the Secretary of State in Council as a body corporate and sub-section (2) enacted that every person should have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act 1858 had not been passed. Government of India Act 1919,<sup>2</sup> enacted an identical provision in section 32 and this was continued in section 176 of the Government of India Act, 1935. After Independence Act, 1947 the Dominion of India and the different Provinces were constituted juristic persons as is it were, for the purpose of suing and being sued just as the Secretary of State for India in Council was under the earlier legislation.<sup>3</sup> Therefore in all those cases where the East India Company could be sued by the subject, a suit would be maintainable against the Government.

The East India Company had been invested with powers and privileges of two fold nature, perfectly distinct from each other, namely, powers to carry trade as merchants and (subject only to the Preogative of the Crown to be exercised by the Board of Commissioners for the affairs of India) power to acquire and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India.<sup>4</sup> The act done in the execution of these sovereign powers were not subject to the control of Municipal courts. This was sufficiently established by the cases of *The Nabab of Arcot v East India Company*<sup>5</sup> in the Court of Chancery in 1793 and *East India Company v. Syed Abas*<sup>6</sup>. The acts of a Sovereign, which cannot be questioned in his courts are acts of State strictly so called. But what is an act of state may now be considered.

In *P & O.S.N. Co v Secretary of State for India*<sup>7</sup> the suit was against the Secretary of State for damages caused by the negligence of the servants of Government. There Peacock, C.J. observed: "In determining the question whether the East India Company would under the circumstances have been liable to an action, the general principle to sovereigns and States and the reasoning deduced from the maxim of the English Law that the King can do

1. 5 & 6 Geo Vc 61.

2. 9 and 10 Geo Vc 10.

3. See 176 *Government of India Act, 1935* as adapted in 1947.

4. *Gibson v East India Company* (1839) 6 Bing N.C 262; 8 LJ (N.S) CP 193.

5. 7 M.L.A. 555

6. 5 Bom. HC (App) 1.

wrong, would have no force. We concur entirely in the opinion expressed by Grey, C.J. in the case of *Bank of Bengal v. United Company*<sup>1</sup> that the fact of the company's having been invested with powers usually called sovereign powers did not constitute them sovereigns. The Chief Justice further observed, that "there was a great clear distinction between acts done in the exercise of what were usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."<sup>2</sup> But where an act was done or a contract was entered into, in the exercise of powers usually called sovereign powers, by which was meant powers which could not be lawfully exercised except by a sovereign to exercise them, no action will lie."<sup>3</sup> These passages have sometimes been understood to mean that while the East India Company could be sued in respect of its commercial dealings, it could not be sued in respect of any acts done by it in discharge of rights of sovereignty delegated to them.<sup>4</sup> "While the former proposition" said Tendulkar, J. "is undisputable, the latter is only partially true. In respects of acts of State strictly so-called the Company is no doubt liable but the immunity does not extend to acts done under colour of legal title, although they may be acts in discharge of governmental functions in exercise of the sovereignty delegated to the company."<sup>5</sup> The authority of the decision in the *Peninsular* case<sup>6</sup> has been considerably shaken by the view expressed by the Privy Council in *Vankata Rao v Secretary of State for India*<sup>7</sup>. In this case the appellant sued the Secretary of State for India and in council for damages for wrongful dismissal and the Madras High Court relied on section 32 Government of India Act, 1919 as limiting the right of appellant to sue the Secretary of State for India and in Council in those identical cases where a suit would have lain against the East India Company. Beasley, C.J. observed : "It is sufficient to say that these cases clearly show that the East India Company could only have been sued in its capacity of trading corporation and that it could not have been sued for acts of state or sovereignty, and although the dismissal of a servant of the Crown may not perhaps strictly speaking be described as an act of State, it can certainly be more properly put in the class of acts of sovereignty rather than the class in cases embraced by transactions carried only private individuals and trading corporations, as the control of departments of State must lie in the exercise of certain sovereign rights." On appeal to the Privy Council Lord Roche said : "The reasoning of the Court below as to section 32 of the India Act, 1919 and its effect and bearing on these actions is another matter to which their Lordships must not be taken to give their assent. As at present advised their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body if any to be sued. If it had appeared that the plaintiffs' service under the Act of 1919 was not terminable at pleasure their Lordships are not prepared to say that remedy by suit against the Secretary of State for India and in Council for a breach of the contract of service would not have been available to the plaintiff. Breach of contract by the Crown can

1. Bignall Rep. 12.

2. *Bank of Bengal v. United Co.*, 5 Bom. H. C. App. 1.

3. *Ibid.*, p. 15.

4. *Secretary of State v Cockcroft*, 39 M 351.

5. *P.V. Rao v Khushaldas*, 1949 B. 277 (298).

6. 5 Bom. H.C. (App) 1.

7. 1937 PC 31

in England be raised by petition of right. The fact that for a different reason, namely, that service under the East India Company was at pleasure a precisely similar suit could not have been brought against the Company does not in their Lordships' view conclude the matter either under Clause (2), Section 32 of the Act or on reasoning of Sir Barnes Peacock in the *Pennenslar* case.<sup>1</sup> It would thus appear that the authority of the *Pennensular* case<sup>2</sup> and other cases which took the same view was considerably shaken by the above Privy Council decision.

In *P. V. Rao v Khushaldas*<sup>3</sup> the act of requisition by the Government was questioned and it was argued that the Provincial Government could not be brought before the court and could not be sued in respect of any Governmental or execution act. It was further contended that Government could only be sued in respect of such acts as can be performed by an individual or by trading corporation and when the Government acted as a sovereign authority its acts were outside the purview of and could not be questioned in the Municipal Courts. But Chagla, C. J. observed : "This is rather a startling proposition according to the Advocate General, the courts of law could not compel government to justify its acts as being within the law and cannot give any protection to the subject if Government affects his rights or imposes a liability upon him contrary to the provision of the law. If such proposition were sound, it would completely undermine the position of the judiciary and deprive the subject of the one sure and certain protection he has in any independent judiciary against the illegal and unjustifiable encroachment of the executive. The proposition put forward by the Advocate General is wholly untenable and entirely contrary to the basic principles of British Jurisprudence."

The distinction between governmental and non governmental functions is not valid any more in a social welfare state where the *lassiez faire* is an out-moded concept and Herbert Spencers Social Statics has no place apart from filing of suits against the government.<sup>4</sup> The constitution provides for issuance of writs against the government under Arts 32 and 226 of the Constitution.

It is not correct to argue that the provision of Art. 300 are wholly out of the way for determining the liability of the State. It is true that Arts. 294 and 295 deal with rights to property assets, liabilities and obligations of the erstwhile Governors' Provinces or of the Indian States (specified in Part B of the First Schedule). But Arts. 294 and 295 are primarily concerned with the devolution of those rights, assets and liabilities, and generally speaking, provide for the succession of a State in respect of the rights and liabilities of an Indian State. That is to say, they do not define those rights and liabilities, but only provide for substitution of one government in place of the other. It is also true that the first part of Art. 300, as already indicated, deals only with the nomenclature of the parties to a suit or proceeding, but the Second Part defines the extent of liability by the use of the words "in the like cases" and refer back for the determination of such cases to the legal position before the enactment of the Constitution. That legal position is indicated in the Government of India Act, 1935, section 176 (1) of which is in these words: "The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without predudice to the subsequent provisions of this Chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be

1. 5 Bom. H.C.R. (App) 1

2. *Ibid.*

3. 1949 B 277.

4. *R. D. Shetty v International Airport Authority*, (1979) 3 SCC 489 (510).

sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

It will be noticed that the provisions of Art. 300 (1) and Section 176(1) are mutatis mutandis substantially the same. Section 176 (1) refers back to the legal position as it obtained before the enactment of that Act, as it emerged on the enactment of section 32 of the Government of India Act, 1915.<sup>1</sup>

#### 40.7. Tortious Liability of the State

The question naturally arises: What was the extent of liability of the East India Company for the tortious acts of its servants committed in course of their employment as such? The exact question arose in a case in Calcutta, before the Supreme Court of Calcutta. The Calcutta case appears to have been cited before the High Court of Bombay in the case of *Narayan Krishna Laud v. Gerard Norman, Collector of Bombay*.<sup>2</sup> The Bombay case related to an action of trespass, brought by the plaintiff against the Collector of Bombay in respect of certain land, which the Collector believed was Government property. The report of the Calcutta case, which does not appear to have been reported in any Calcutta legal journal though, on the face of it, it was a judgment of far reaching importance and has always been cited as the leading case on the subject. It was a case decided by a Full Bench, consisting of Peacock, C.J. and Jackson and Wells, JJ. of the Supreme Court of Calcutta. It arose out of a reference by the Small Cause Court Judge under section 55 of Act IX of 1950. The case as stated to the Supreme Court, was to the following effect. A servant of the plaintiffs was proceeding on a highway in Calcutta driving a carriage drawn by a pair of horses belonging to the plaintiffs. The accident, which took place on the highway, was caused by the servants of the Government employed in the Government dockyard at Kidderpore, acting in a negligent and rash manner. As a result of the negligent manner in which the Government employees in the dockyard were carrying a piece of iron, funnel, one of the horses drawing the plaintiffs carriage was injured. The plaintiff company claimed damages against the Secretary of State for India for the damage thus caused. The learned Small Cause Court Judge came to the finding that the defendants servants were wrongdoers in carrying the iron funnel in the centre of the road, and were, thus, liable for the consequences of what occurred. But he was in doubt as the liability of the Secretary of State for the tortious acts of the Government servants concerned in the occurrence in which the injury was caused to the plaintiffs' horse. So the question, which was referred to the Court for its answer, was whether the Secretary of State was liable for the damage occasioned by the negligence of the Government servants, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable. In the course of their judgment, their Lordships began by examining the question whether the proviso to the jurisdiction of the Small Cause Courts to the following effect could be a bar to the suit.

Provided always that the Court shall not have jurisdiction in any matter concerning the revenue, or concerning any act ordered or done by the Governor or Governor-General or any member of the Council of India, or of any Presidency, in this public capacity, or done by any person by order of the Governor-General or Governor in Council, or concerning any act ordered or done by any Judge or Judicial Officer in the execution of his office, or by any person in pursuance of judgment or order by any Court, or any such Judge or Judicial Officer, or any suit for libel or slander (Proviso to Section 25 of the Small Cause Courts Act).

1. *State of Rajasthan v Mst. Vidyawati*, 1962 SC 933 (936).

2. 5 Bom. (HCR) (OC) 1.

The Court came to the conclusion that the proviso was not a bar to the suit. Having disposed of the preliminary question the Court addressed itself to the main controversy, which it described as "one of very considerable importance and of some difficulty." Then the Court considered the provisions of section 65 of the Act of 1858, and pointed out that as the Queen could not be sued in her own courts, as the East India Company could have been, it was necessary to provide by that section the mode for enforcing the liabilities of the Company now devolved upon the Secretary of State. Then the Court addressed itself to the question: Would the East India Company have been liable in the present section if the Act (21 & 22 Vict. ch. 106) had not been passed. With reference to the provisions of 3 & 4 Wm. IV, c.85, it was pointed out that the Company not only exercised powers of government but also carried on trade as merchants. The Court then examined in great detail the provisions of the Act aforesaid and pointed out that by that Act the Company was directed to close its commercial business and cease to have any interest in the territorial acquisition in India which were to be held by the Company until April 30, 1854, in trust for the Crown. Section 10 of that Act, which may be characterised as the ancestor of Section 65 of the Act of 1858, provided as follows :

"That so long the possession and government of the said territories shall be continued to the said Company, all persons and bodies politic shall and may have and take the same suits, and proceedings, legal and equitable, against the said Company, in respect of such debts and liabilities as aforesaid; and the property vested in the said Company in trust as aforesaid shall be subject and liable to the same judgments and execution, in the same manner and form respectively as if the said property were here by continued to the said company to their own use." It is noteworthy that the provisions of section 10, quoted above, are materially similar to the latter part of section 65 of the Act of 1858. It was in accordance with the provisions of section 10, followed up by section 65 aforesaid that the Court laid it down that the Secretary of State for India was subject to the same liabilities as those which previously attached to the East India Company.

Before the Supreme Court of Calcutta, it was contended by the learned Advocate General, on behalf of the defendant, that the State cannot be liable for damages occasioned by the negligence of officers or of persons in its employment. It was pointed out "it is true that it is an attribute of sovereignty that a State cannot be sued in its own courts without its consent. In England the Crown it was further pointed out, "cannot be made liable for damages for the tortious acts of its servants either by petition of Right or in any other manner, as laid down by Lord Lyndhurst in the case of *Viscount Canterbury v Attorney General*.<sup>1</sup> That decision was based upon the principle that the King cannot be guilty of personal negligence or misconduct and consequently cannot be responsible for the negligence or misconduct of his servants. The Court further pointed out that it was in view of these difficulties in the way of getting redress that the liability of the Secretary of State, in place of that of the East India Company, was specifically provided for by Section 10 aforesaid. The East India Company itself could not have claimed any such immunity as was available to the Sovereign. This view was based on the opinion expressed by Grey, C.J., in the case of *Bank of Bengal v The East India Company*'s<sup>2</sup> that "the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns. This dictum was also founded

1. (1843) 1 Ph. 306.

2. Bignell Rep. 120.



upon the recital in 58 Geo IIIc. 155, by the which the territories in the possession and under the government of the East India Company were vested in them without prejudice to the undoubted sovereignty of the Crown. The Court also pointed out that the liability of the Secretary of State was in no sense a personal liability, but had to be satisfied out of the revenues of India.

The *State of Rajasthan v Mst Vidyawati*,<sup>1</sup> also, meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare state, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this respect, the present set up of the Government is analogous to the position of the East India Company, which functioned not only as a Government with sovereign powers, as a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, post and telegraphs and road transport business. It was in the context of those facts that the Supreme Court of Calcutta repelled the argument advanced on behalf of the Secretary of State in these terms :

“It was contended in argument that the Secretary of State in Council, as regards his liability to be sued, must be considered as the State or as a public officer employed by the State. But, in our opinion his liability to be sued depend upon an express enactment in the 21st & 22nd Vict. c. 106 by which he is constituted a mere nominal defendant for the purpose of enforcing payment out of the revenues of India, of the debts and liabilities which had been contracted or incurred by the East India Company, or debts or liabilities of a similar nature, which might afterwards be contracted or incurred by the Government of India. We are further of opinion that the East India Company were not sovereigns, and, therefore, could not claim all the exemption of a sovereign ; and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons ; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit and were engaged in transactions partly for the purposes of government, and partly on their own account, which without any delegation by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.

It was also argued before the Supreme Court of Calcutta that the East India Company having two-fold character of a sovereign power and of a trading company, it would be very difficult to determine whether a particular act had been done in the exercise of sovereign powers or of its activity in relation to trade and business. In answer to this contention, it was pointed out by the Court that the Company would not have been liable for any act done by its officers or soldiers in carrying on hostility or in seizing property as prize property or while engaged in military or naval action. In such cases no action would have lain even against the officers themselves. But the Company would have been liable for the negligence of their servants or officers in navigating a river steamer or in repairing the same or in doing any act in repairing or in doing any act in relation with such repairs.

1. 1962 SC 933 (938)

The argument that a distinction had to be drawn between the liability under a contract and that arising out of a wrongful act, and that the latter category of liability would not be within the mischief of the words of the section (S. 65) was rightly repelled with reference to the words of the Statute, which said "debts lawfully contracted and expenses of liabilities incurred". The latter expression liabilities incurred would include a liability arising out of a tortious act. The Court, after an elaborate consideration of all possible arguments in favour of the Secretary of State, came to the following conclusion, which is rightly summed up in the head-note in those words :

"The Secretary of State in Council of India is liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable."

The law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the Common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also.

Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant. The Supreme Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of *State of Bihar v. Abdul Majid*,<sup>1</sup> the Supreme Court has recognised the right of a Government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause of action in *State of Rajasthan v. Vidyawati*<sup>2</sup> arose after the coming into effect of the Constitution, Sinha, C.J. said "in our opinion it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Art. 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of the East India Company."

It is often maintained that a State as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects.<sup>3</sup> Any act of the Government which is not

1. 1954 SCR 786 : 1954 S. C. 245.

2. 1962 S C 933 (939-40)

3 Oppenheim International Law, Vol. 1, p. 304.

an act of State acts not affecting to justify themselves on grounds of Municipal law—but which is done under colour of legal title may be questioned in a Civil Court. Art. 300 of the Indian Constitution is only a provision relating to parties and procedure and does not affect, limit or bar the right of action of a person entitled to a right against the Government. While Art. 361 confers a personal immunity to the President, the Governor or Rajpramukh of a State it distinctly says that nothing in clause (1) shall be construed as restricting the right of any persons to bring appropriate proceedings against the Government of India or the Government of a State.<sup>1</sup>

#### 40.8. Act of State

As to the alleged act of state, it is necessary to consider what is meant by the expression "act of state" even if it is not expedient to attempt a definition. It is an exercise of sovereign power. Obvious examples are making war and peace, making treaties with foreign Sovereigns, and annexations and cessions of territory. Apart from these obvious examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court. An act of state is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate on the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that, because it was an act of state, the court has no jurisdiction to entertain a claim in respect of it. This is a very unusual situation and strong evidence is required to prove that it exists in a particular case.<sup>2</sup>

The question whether some governmental act was an act of state depends on the nature of the act and (sometimes at any rate) on the intention with which it was done, and the intention is to be inferred from words and conduct and surrounding circumstances. Some extracts from a leading judgment in this branch of the law will assist to show what is involved.<sup>3</sup>

In the *Tanjore* case (*Secretary of State in Council of India v. Kamachee Boye Sahaba*)<sup>4</sup> Lord Kingsdown said ".....the main point taken, and that on which their Lordships think that the case must be decided, was this that the East India Company, as trustees for the Crown, and under certain restrictions, are empowered to act as a Sovereign State in transactions with other Sovereign States in India; that the Rajah of Tanjore was an independent Sovereign in India; that on his death, in the year 1855, the East India Company, the exercise of their sovereign power, thought fit, from motives of State, to seize the property of the Raja of Tanjore and the whole of the property the subject of this suit, and did seize it accordingly; and that over an act so done, whether rightfully or wrongfully, no Municipal Court has any jurisdiction. The general principle of law was not as indeed it could not, with any colour of reason, be disputed. The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they make."

1. Art. 361 (1) Second Proviso.

2. *Attorney General v. Nissan*, (1969) 1 All E. R. 629 (659-60).

3. *Ibid.*, p. 660.

4. (1859) 7 Moo. Ind. App. 476.

He further said, "the next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation."

The importance of intention appears from a later judgment,<sup>1</sup> where he said "But whatever may be the meaning of this letter, it affords no argument in favour of the judgment of the Court; but rather an argument against it. It shows that the Government intended to seize all the property which actually was seized, whether public or private, subject to an assurance that all which, upon investigation, should be found to have been improperly seized, would be restored. But, even with respect to property not belonging to the Raja, it is difficult to suppose that the Government intended to give a legal right of redress to those who might think themselves wronged, and to submit the conduct of their officers, in the execution of a political measure, to the judgment of a legal tribunal. They intended only to declare the course which a sense of justice and humanity would induce them to adopt. With respect to the property of the Rajah, whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters, his relations and dependants; but they intended to do this according to their own notions of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Court".<sup>2</sup>

There is also a passage in the judgment of Turner, L. J., in *Secretary of State in Council of India v. Hari Bhanji*<sup>3</sup> which affords some guidance as to the character of an act of state (although there is an error if and in so far as it is implied that an act of state could be committed against a subject within the realm). He in *Secretary of State in Council of India v. Hari Bhanji*,<sup>4</sup> said "Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of municipal law, and although in the administration of domestic affairs the Government ordinarily exercises powers which are regulated by that law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to act which do not pretend to justify themselves by any canon of municipal law...Acts thus done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be acts of state of which municipal courts are not authorised to take cognisance." There are, of course, also more modern authorities, but it will be sufficient for the sake of brevity, to cite the headnote of *Salaman v. Secretary of State in Council of India*,<sup>5</sup>: "Where the East India Company, as representing the Crown, has done acts of such a nature, and under such circumstances, as to lead to the conclusion that those acts were done in the exercise of supreme power, as acts of State, and to negative any intention to give thereby legal rights, whether contractual or otherwise, to an individual or individuals as against the Company, the Municipal Courts have no jurisdiction

1. *Secretary of State in Council of India v. Kamahe Boye Sahaba*, (1859) 7 Mood. Ind. App. 476 (531, 539).
2. *Attorney General v. Nizari* (1969) 1 All. E. R. 629 (660-661).
3. (1882) Ind. L. R. 5 Mod. 273.
4. (1882) Ind. L. R. 5 Mod. at p. 279.
5. (1906) 1 K. B. 613.

to question the validity of those acts, or to entertain any claim in respect thereof by an individual against the Secretary of State for India, as the successor of the East India Company."

It has long been one of the liberties of the subject that when a wrong is done to him by the executive he cannot be shut out from justice by the faceless plea of an act of State. Sir James Fitzjames Stephen said in his *History of the Criminal Law of England*,<sup>1</sup> "the doctrine as to acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals".

The penultimate sentence almost in exact terms was used in argument and accepted in *Walker v. Baird*.<sup>2</sup> And it was affirmed by Lord Phillimore in *Johnstone v. Pedlar*.<sup>3</sup> In the same case Viscount Finlay said<sup>4</sup> that the doctrine of state "has no application to any case in which the plaintiff is a British subject".<sup>5</sup>

The forceful statements in *Walker v. Baird*,<sup>6</sup> and *Johnstone v. Pedlar*,<sup>7</sup> to the effect that act of state is no defence against the claim of a British subject could have intended the implication "so long as the subject is within the realm." They could also have intended no such implication, and have been meant, at their face value, to apply wherever the subject might be. I think the latter slightly more probable, but their Lordships were certainly not directing their minds to this particular point since in each case the mischief done by the executive was in fact within the realm. In *Salmond on Torts*<sup>8</sup> the authorities are summed up in the words: "A British subject owes allegiance to the Crown in whatever part of the world he may be; it seems therefore that the Crown cannot plead act of State against him, wherever the wrong may have been committed."<sup>9</sup>

There is nothing in any of these cases to suggest that if the Crown actively interferes with the person or property of a British subject in England he is barred from a remedy in the courts because that act was done in carrying out or implementing some act of state such as an annexation or a treaty with a foreign power. A subject must of course put up with loss which he suffers indirectly through the treaty obligations of the Crown. But it seems to be clearly contrary to the liberties of the subject that he should have no remedy if the Crown within the realm directly interferes with his liberties of person or property even if it does so in accordance with some treaty with a foreign power. There is some force in the argument that the interference by the Crown with a subject's liberties of person or property abroad cannot be barred from consideration in the courts by the plea of an act of state.<sup>10</sup>

1. (1883) Vol. 2 p. 65.

2. (1892) A. C. 491 (494).

3. (1921) 2 A. C. 262 (295); (1921) All E. R. Rep. 176 (191).

4. (1921) 2 A. C. 262 (272); (1921) All E. R. Rep. 176 (180).

5. *Attorney General v. Nissan*, (1969) 1 All E. R. 629 (648).

6. (1892) A. C. 491.

7. (1921) A. C. 262; (1921) All E. R. Rep. 176.

8. 14th Ed. 1965 p. 607

9. *Attorney General v. Nissan*, (1969) 1 All E. R. 629 (649).

• 10 Ibid., p. 650.

Lord Sumner said that *Buron v. Denman*,<sup>1</sup> was a case rather of the inability of the court than of the disability of the suitor :

“Municipal Courts do not take it upon themselves to review the dealings of state with State or of Sovereign with Sovereign.” They do not control the acts of a foreign State done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification.”

He did also add that :<sup>2</sup>

“What the Crown does to foreigners by its agents without the realm is State action also, and is beyond the scope of domestic jurisdiction.”

Lord Kingsdown in 1859 in delivering the judgment of the Privy Council in *Secretary of State in Council of India v. Kamachee Boye Sahaba* had said :<sup>3</sup>

“The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer : such Courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make”.

Viscount Finlay said that it was settled law<sup>4</sup> : “that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown.”

A servant of the Crown may by his act infringe the rights of an individual so as to cause him damage. Then, if that servant of the Crown is sued, the question is whether it is a defence to him to prove that his act was ordered or ratified by the Government. Or, secondly, the action of the government or of its servants may cause consequential loss to an individual although it does not infringe any of his ordinary rights. Or, again, the action of the government or of its servants may be in exercise of the royal prerogative in which case the action is not unlawful but the question is whether the individual is entitled to compensation.<sup>5</sup>

Where an act of a servant of the Crown infringes the rights of a British subject it has been settled law for centuries that it is no defence to plead that the act was ordered or ratified by the Crown or the government. And since the decision of House of Lords in *Johnstone v. Pedler*,<sup>6</sup> it has been equally clear that an alien in this country—other than an enemy alien—is in the same position. And now that it is possible to sue the Crown directly by virtue of the Crown Proceedings Act, 1947 the position must be the same as it would have been if the action had been brought against the individual wrongdoer. The other case is, clear where the act complained of was done against an alien

1. (1848) 2 Exch. 167.

2. (1921) 2 A. C. 262 (290) ; 1921 All E. R. Rep. 176 (189).

3. (1859) 7 Moo. Ind. App. 476 (529) : *Attorney General v. Nisan*, (1969) 1 All E. R. 629 (642-43).

4. (1921) 2 A. C. at p. 271 ; (1921) All E. R. p. 180 ; *Attorney General v. Nisan*, (1969) 1 All E. R. 629 (645).

5. *Attorney General v. Nisan*, (1969) 1 All E. R. 629 (634).

6. (1921) 2 A. C. 262 ; (1921) All E. R. Rep. 176.

outside Her Majesty's dominions. Since *Buron v. Denman*,<sup>1</sup> it has been accepted that if the act was ordered or has been ratified by the British government the English courts cannot give redress to that alien. He may enlist the support of his own government who may make diplomatic representations, but he has no legal remedy in England.

Lord Reid said "Let me take first the leading case of *Johnstone v. Pedlar*.<sup>2</sup> There the plaintiff was an alien within the United Kingdom, so the rights of a British subject outside the realm were not in issue. But there was a general discussion of the whole question, and the way in which at least Viscount Finlay, Viscount Cave and Lord Phillimore expressed their opinions that they must have had this in mind, and must have thought that it was settled law that British subjects, unlike aliens, were entitled to legal redress in respect of acts of the executive outside the realm". Lord Finlay, J. said<sup>3</sup> :

"It is the settled law of this country...that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be used in tort, but the person who did the act is liable in damages, as any private person would be. This rule of law has, however, been held subject to qualification in the case of acts committed abroad against a foreigner. If an action be brought in the British Courts in such a case it is open to the defendant to plead that the act was done by the orders of the British Government, or that after it had been committed it was adopted by the British Government. In any such case the act is regarded as act of State of which a municipal Court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means."

Then Lord Reid, J. cited *Buron v. Denman*<sup>4</sup> and went on<sup>5</sup> : "This doctrine has no application to any case in which the plaintiff is a British subject." Lord Cave's statement<sup>6</sup> was to the same effect and Lord Phillimore said<sup>7</sup> :

"The defence set up in the present case is sometimes called the defence of an act of State. As regards this way of looking at it, I cannot put the matter better or more tersely than as I found it put in one of the reasons given by the successful plaintiffs in their case as respondents before the Privy Council in *Walker v. Baird*<sup>8</sup> : 'Because between Her Majesty and one of her subjects there can be no such thing as an act of State.' And this proposition was finally accepted in the case of *Walker v. Baird*.<sup>9</sup>

Lord Atkinson and Lord Sumner did not dissent in any way from these views. It is true that they were *obiter*, but it is clear that the whole matter had been fully considered.

1. (1848) 2 Exch. 167 : *Attorney General v. Nissan*, (1969) 1 All. E. R. 629 (634).

2. (1921) 2 A. C. 262 : (1921) All. E. R. Rep. 176.

3. (1921) 2 A. C. (271) : (1921) All. E. R. Rep. at p.180.

4. (1848) 2 Exch. 167.

5. (1921) 2 A. C. (272) : (1921) All. E. R. Rep. 180. ¶

6. (1921) 2 A. C. (275) : (1921) All. E. R. Rep. 182.

7. (1921) 2 A. C. (295) : (1921) All. E. R. Rep. 191.

8. (1892) A. C. 491.

9. (1982) A. C. 491 : *Attorney General v. Nissan*, (1969) 1 All. E. R. 629 (634-5.)

"Before considering dicta which appear to favour the Crown's contention" said Lord Reid "I must advert to the kinds of cases in which most of them appear. Many arise out of annexations of territory by conquest or by cession. The former Sovereign of the annexed territory, being an alien, has no legal redress even when property confiscated is alleged to include his private property. And no one, whether a British subject or not, can complain that, by dispossessing the former Sovereign, the Crown has made his rights against that Sovereign worthless. In order to succeed he would have to found on the act of the Crown as having imposed on the Crown a new liability. That he cannot do".<sup>1</sup>

In *Doss v. Secretary of State for India in Council*<sup>2</sup> the King of Oudh had been dispossessed after the Indian mutiny and a creditor of his, apparently a British subject, being unable to recover against the dispossessed Sovereign, maintained that the Indian government had become liable to him. But, as Sir Richard Malins, V. C., pointed out,<sup>3</sup> an annexation cannot create new rights against the new Sovereign. "I think" said Lord Finlay "that the same principle applied to *Rajha Ram v. Secretary of State for India*"<sup>4</sup>. Estates had been assigned by the East India Co. for the maintenance of the King of Delhi and when he was deposed and these estates were resumed, a mortgagee of these estates claimed unsuccessfully the sum due under the mortgage. In *Cook v. Spring*<sup>5</sup> Cook had obtained concessions from the ruler of Pondoland who was thereafter dispossessed. He sued the colonial government and failed. He only had rights against the former ruler. Similarly in *West Rand Central Gold Mining Co., Ltd v. Regem*<sup>6</sup> the government of the South African Republic had taken gold bars from the plaintiffs and they claimed that the Crown having annexed the Transvaal should pay the debt of the former Sovereign. *Secretary of State in Council of India v. Kamachee Boye Sahaba*<sup>7</sup> was founded on, but that only deals with the property of the dispossessed Sovereign and "I cannot accept" said Lord Reid, J. "the view that it affords any justification for the submission that the property of a British subject in conquered territory can be confiscated."<sup>8</sup>

A good deal of the trouble has been caused by using the loose phrase "act of state" without making clear what is meant. Sometimes it seems to be used to denote any act of sovereign power or of high policy or any act done in the execution of a treaty. That is a possible definition, but then it must be observed that there are many such acts which can be the subject of an action in court if they infringe the rights of British subjects. Sometimes it seems to be used to denote acts which cannot be made the subject of enquiry in a British court. But does not tell us how to distinguish such acts; it is only a name for a class which has still to be defined. One definition which has been accepted in some quarters is that of Professor Wade, quoted in Halsbury's *Laws of England*.<sup>9</sup>

"An act of the executive as a matter of policy performed in the course of its relations with another state including its relations with the subjects of that state,

1. *Attorney General v. Nissan*, (1969) 1 All E. R. 629 (636).

2. (1875) L. R. 19 Eq. 509.

3. (1875) L. R. 19 Eq. 532.

4. (1872) 2 Sutherland P. C. App. 726.

5. (1899) A. C. 572 : (1895-99) All E. R. Rep. 773.

6. (1905) 2 K. B. 391.

7. (1859) 7 Moo. Ind. App. 476.

8. *Attorney General v. Nissan*, (1969) 1 All E. R. 629 (636-7).

9. 3rd Ed., p. 279.



unless they are temporarily within the allegiance of the Crown, is an act of state."

"I do not think" said Lord Reid, J. "that this is entirely satisfactory. I am not sure what is meant by 'as a matter of policy'. One hopes that all acts of the executives are done as a matter of policy and not on random decisions, and certainly it would not be possible for a court to enquire whether a particular act of the executive had or had not been done as a matter of policy." And what about acts subsequently ratified? When Captain Denman acted against the Spaniard *Buron v. Denman*<sup>1</sup> it must have been his policy, for he acted without orders and, when his act was ratified, the policy may simply have been in those days to support Her Majesty's officers against foreigners. Then next 'in the course of its relations with another state': I do not much like this as a description of a war of conquest. I think one would have to add "or against another state or a subject of that state". I have already said that I can find no reason why an act performed against a British subject should take on a different character and become an act of state because done by the government in the course of or arising out of its relations with another state. And *Walker v. Baird*<sup>2</sup> shows that it does not, at least when done within British dominions. Professor Wade was no doubt merely attempting to make the best of a confused body of authority, and not attempting to make new law. If I attempted that I would certainly do not better. But I would suggest to your Lordships that we cannot rest content with that. I think we must say either that all acts of the executive are acts of state, or that acts of the executive should only be called acts of state in cases where the court will not enquire into them or given relief in respect of them but should not be called acts of state when the court's jurisdiction is not ousted".<sup>3</sup>

It is sometimes said that the question whether an act done on behalf of or ratified by the Crown—which here must mean the government—is an act of state, depends on the nature or quality of the act, and that it is for the court to determine whether any act is an act of state. It is true that the court must determine, on such facts as are available, whether the act was done in purported exercise of a legal right; if it was it cannot be regarded as an act of state. But if it was not done in purported exercise of any legal right and was done by an officer of the Crown apparently in the course of his duty, then it appears to me that it must be for the Crown to say whether it claims that the act was an act of state. But if it was not done in purported exercise of any legal right and was done by an officer of the Crown apparently in the course of his duty, then it appears to me that it must be for the Crown to say whether it claims that the act was an act of state. The act may appear to be of a routine or trivial character. But in a delicate situation there may be discussion and decision at the highest level about such acts, and the decision to do such an act may be a decision of high policy. If the Crown claims that such an act was done as an act of state I do not see what right the court can have to reject that claim: the court cannot enquire into or ask the Crown to disclose the reason why the act was done. And even if the act was done by a subordinate officer on his own responsibility, it is always open to the Crown to ratify it and thereby make it an act of state.<sup>4</sup>

1. (1842) 2 Exch. 167.

2. (1892) A. C. 491.

3. *Attorney General v. Niaman*, (1969) 1 All. E. R. 629 (637-8).

4. *Ibid.*, p. 638.

## Executive Power during Emergency

### SYNOPSIS

41.1. When Martial Law can be imposed

41.2 Military Aid

#### 41.1. *When Martial Law can be imposed*

Martial law is the exercise of the power which resides in the executive branch of the Government to preserve order and insure the public safety in time of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety. It is a law of necessity to be prescribed and administered by executive power.<sup>1</sup>

Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. There are occasion when martial rule can be properly applied. If in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then on the theatre of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. A necessity creates the rules, so it limits duration; for if this government is continued after the courts are instated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the power and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.<sup>2</sup>

The Constitution does not provide for the promulgation of martial law but it contemplates that there may be occasion when the government may

1. *Duncan v. Kahanamoku*, 90 Led 688 (706).

2. *Ex parte Lambdin P. Milligan*, 16 Led 281 (297-79).

have to proclaim martial law. Article 34 of the Constitution lays down restriction of Part III while martial law is in force in any area. It says :

Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or a State or any other person in respect of any act done by him in connection with the maintenance or restoration or order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.<sup>1</sup>

#### 41.2. *Military aid*

In performance of its essential function, in promoting the security and well being of its people the State must of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise.<sup>2</sup> As the State has no more important interest than the maintenance of law and order, the power it confers upon its executive the President, Chief Executive and Commander-in-Chief and the Governor to suppress insurrection and to preserve the peace is of the highest consequence. The Executive is appropriately vested with the discretion to determine whether the exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. The power as to be exercised upon sudden emergencies, upon great occasions of State and under the circumstances which may be vital to the existence of Union".<sup>3</sup> The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measure to be taken in meeting force with force in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures conceived in good faith in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.<sup>4</sup>

The Government of India has on several occasions sought military aid to help the civil authorities in combating floods, in dropping food etc. Recently the military was called to aid the civil authorities to face the situation in Punjab.

1. *Constitution of India*, Art. 34.

2. *Sterling v. Constantin*, 77 L ed 375 (386).

3. *Martin v. Mott*, 6 L ed 537 (540-41).

4. *Sterling v. Constantin*, 77, ed 375.

# CONSTITUTION OF INDIA

[AS AMENDED UPON THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976]

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a <sup>1</sup>[SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens :

JUSTICE, social, economic and political ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status of opportunity ;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the <sup>2</sup>[unity and integrity of the Nation] ;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

## PART I

### THE UNION AND ITS TERRITORY

1. *Name and territory of the Union.*—(1) India, that is Bharat, shall be a Union of States.

<sup>2</sup>[(2) The States and the territories thereof shall be as specified in the First Schedule.]

(3) The territory of India shall comprise—

(a) the territories of the States ;

<sup>3</sup>[(b) the Union territories specified in the First Schedule ; and]

(c) such other territories as may be acquired.

2. *Admission or establishment of new States.*—Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

<sup>4</sup>2A. [Sikkim to be associated with the Union.] Rep. by the Constitution (Thirty-six Amendment) Act, 1975, Sec. 5 (w.e.f. 26-4-1975).

1. Subs. by the Constitution (Forty-second Amendment) Act, 1976, Sec. 2 for 'Sovereign Democratic Republic w.e.f. 3-1-1977.
2. Subs. by the Constitution (Seventh Amendment) Act, 1956, Sec. 2 w. e. f. 1-11-56.
3. Subs. by Sec. 2, *ibid*, for the original sub-clause (b), the territories specified in Part D of the First Schedule
4. Ins. by the Constitution (Thirty-fifth Amendment) Act, 1947, Sec. 2 (w.e.f. 1-3-1975).

**3. Formation of new States and alteration of areas, boundaries or names of existing States.**—Parliament may by law—

- (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State ;
- (b) increase the area of any State ;
- (c) diminish the area of any State ;
- (d) alter the boundaries of any State ;
- (e) alter the name of any State :

<sup>5</sup>[Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States \* \* \* \*, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.]<sup>7</sup>

<sup>6</sup>[*Explanation I.*—In this article, in clauses (a) to (e), “State” includes a Union territory, but in the proviso, “State” does not include a Union territory.

*Explanation II.*—The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.]

**4. Laws made under Articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.**—(1) Any law referred<sup>6</sup> to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary, to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary,

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

5. Subs. by the Constitution (Fifth Amendment) Act, 1955, Sec. 2 for the original proviso.

6. The words and letters “specified in Part A or Part B of the First Schedule” omitted by the Constitution (Seventh Amendment) Act, 1956, Sec. 29 and Schedule.

7. In its application to the State of Jammu and Kashmir the following further proviso shall be added to Art 3 :—

“Provided further no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.”

8. Ins. by the Constitution (Eighteenth Amendment) Act, 1966 Sec. 2 w.e.f. 27-8-1966.

## PART II\*

## CITIZENSHIP

5. *Citizenship at the commencement of the Constitution.*—At the commencement of this Constitution every person who has his domicile in the territory of India and—

- (a) who was born in the territory of India ; or
- (b) either of whose parents was born in the territory of India ; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

6. *Rights of citizenship of certain persons who have migrated to India from Pakistan.*—Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—

- (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) ; and
- (b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration ; or
- (ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government ;

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

7. *Rights of citizenship of certain migrants to Pakistan.*—Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India :

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.<sup>10</sup>

9. This Part shall be deemed to have been applicable in relation to the State of Jammu and Kashmir, as from the 26th day of January, 1950.

10. In its application to the State of Jammu and Kashmir the following further provision shall be added to Art. 7—

“Provided further that nothing in this article shall apply to a permanent resident of the State of Jammu and Kashmir who after having so migrated to the territory now included in Pakistan returns to the territory of that State under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by the Legislature of that State, and every such person shall be deemed to be a citizen of India.”

8. *Rights of citizenship of certain persons of Indian origin residing outside India*.—Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefore to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

9. *Persons voluntarily acquiring citizenship of a foreign State not to be citizens*.—No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.

10. *Continuance of the rights of citizenship*.—Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

11. *Parliament to regulate the right of citizenship by law*.—Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.<sup>10a</sup>

### PART III

#### FUNDAMENTAL RIGHTS

##### *General*

12. *Definition*.—In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

<sup>11</sup>13. *Laws inconsistent with or in derogation of the fundamental rights*.—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The state shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law ;

<sup>10a</sup> Parliament has enacted the citizenship Act, 1955 regulating rights of citizenship.

11. In its application to the State of Jammu and Kashmir, in Art. 19, reference to the commencement of the Constitution shall be construed as reference to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, i.e. the 14th day of May, 1954.

- (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

<sup>13</sup>[(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.]

### *Right to Equality*

**14. Equality before law.**—The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

**15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.**—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment ; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State for making any special provision for women and children.

<sup>13</sup>[(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.<sup>14</sup>]

**16. Equality of opportunity in matters of public employment.**—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

<sup>15</sup>(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office <sup>16</sup>[under the Government of, or any local or other authority within,

12. Ins. by the Constitution (Twenty-fourth Amendment) Act, 1971 Sec. 2, w.e.f. 5-11-1971.

13. Added by the Constitution (First Amendment) Act, 1951, Sec 2 w.e.f. 18-6-1951.

14. In its application to the State of Jammu and Kashmir, reference to the Scheduled Tribes in Cl. (4) of Art 15 shall be omitted.

15. In Cl. (3) of Art. 16, the reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir.

16. Subs. by the Constitution (Seventh Amendment) Act, 1956 Sec. 29 and Sch. : For under any State specified in the First Schedule of any local or other authority within its territory, any requirement as to residence within that State. w.e.f. 1-11-1956.



a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

17. *Abolition of Untouchability.*—"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

18. *Abolition of titles.*—(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

### *Right to Freedom*

<sup>17</sup>19. *Protection of certain rights regarding freedom of speech, etc.*—(1) All citizens shall have the right—

- (a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions ;
- (d) to move freely throughout the territory of India ;
- (e) to reside and settle in any part of the territory of India<sup>17a</sup> ;

17. In its application to the State of Jammu and Kashmir, for a period of twenty-five years from the 14th May, 1954, Art. 19 shall be subject to the following modifications :—

- (i) in Cls. (3) and (4) after the words "in the interest of" the words "the security of the State or" shall be inserted ;
- (ii) in cl. (5), for the word "or for the protection of the interests of any Schedule Tribe", the words "or in the interests of the security of the State" shall be substituted ; and
- (iii) the following new clause shall be added, namely :—

"(7) The words reasonable restrictions" occurring in cls. 2, 3 4 and 5 shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.

17a. Ins. by the Constitution (Forty fourth Amendment) Act. 1978 Sec. 2 (w.e.f. 20-6-1978.)

(f)

(g) to practise any profession, or to carry on any occupation, trade or business.

<sup>1a</sup>a[ (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of <sup>1a</sup>a[the sovereignty and integrity of India], the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.]

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of <sup>1a</sup>b[the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of <sup>1a</sup>[the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, <sup>2a</sup>[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

20. *Protection in respect of conviction for offences.*—(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

18. Sub-clause (f) omitted by Sec. 2 of the Forty fourth amendment of the Constitution.

18a. Subs. by the Constitution First Amendment Act, 1951 Sec. 3 for the original cl. 2 with retrospective effect

18b. Ins. by the Constitution Sixteenth Amendment Act, 1963 Sec. 2

19. Ins. by the Constitution Sixteenth Amendment Act, 1963 Sec. 2

20. Subs. by the Constitution First Amendment Act, 1951 Sec. 3 for certain original words.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

**21. Protection of life and personal liberty.**—No person shall be deprived of his life or personal liberty except according to procedure established by law.

**22. Protection against arrest and detention in certain cases.**—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien ; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

<sup>1</sup>(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7) ; or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

<sup>2</sup>(7) Parliament may by law prescribe—

**21.** In its application to the State of Jammu and Kashmir, in cl. (4) of Art. 22, for the word "Parliament", the words "the Legislature of the State" shall be substituted.

**22.** In its application to the State of Jammu and Kashmir, in cl. (7) of Art. 22, for the word "Parliament" the words "the Legislature of the State" shall be substituted.

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4) ;
- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

### *Right against Exploitation*

**23. Prohibition of traffic in human beings and forced labour.**—(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

**24. Prohibition of employment of children in factories, etc.**—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

### *Right to Freedom of Religion*

**25. Freedom of conscience and free profession, practice and propagation of religion.**—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;
- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

**26. Freedom to manage religious affairs.**—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- (a) to establish and maintain institutions for religious and charitable purposes ;

- (b) to manage its own affairs in matters of religion ;
- (c) to own and acquire movable and immovable property ; and
- (d) to administer such property in accordance with law.

**27. Freedom as to payment of taxes for promotion of any particular religion.**—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

**28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.**—(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instructions shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

### *Cultural and Educational Rights*

**29. Protection of interests of minorities.**—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

**30. Right of minorities to establish and administer educational institutions.**—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1-A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (f), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

### *Right to Property*

**31. Article 31 which appeared under the sub title 'Right to Property', before its repeal by the constitution stood as follows :**

**"31. Compulsory acquisition of property.**—(1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles

and given in such manner as may be specified in such law ; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash :

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (4) of Article 30, the State shall ensure that the amount fixed or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

(2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property, notwithstanding that it deprives any person of his property.]

(2-B) Nothing in sub-clause (f) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2).

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding any thing in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification ; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of Section 129 of the Government of India Act, 1935."

**29[*Saving of Certain Laws*]**

**29[31-A. *Saving of laws providing for acquisition of estates, etc.*—<sup>29</sup>[(1)**  
 Notwithstanding anything contained in Article 13, no law providing for—

- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
- (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 :

<sup>30</sup>Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent :]

<sup>31</sup>[Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.]

(2) In this article,—

- 27. Ins. by the Constitution (Forty-second Amendment) Act, 1976, Sec. 3, w.e.f. 20-4-72
- 28. Ins. by the Constitution (First Amendment) Act, 1951, Sec. 4 with retrospective effect
- 29. Subs. by the Constitution (Fourth Amendment) Act, 1955, Sec. 8 for the original clause with retrospective effect
- 30. In its application to the State of Jammu and Kashmir, the proviso to Cl. 1 of Art. 31A shall be omitted
- 31. Ins. by the Constitution Seventeenth Amendment Act, 1964 Sec 2

<sup>32</sup>[<sup>33</sup>(a) the expression "estate", shall, in relation to any local area, have the same meaning as the expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of <sup>34</sup>[Tamil Nadu] and Kerala, any *janmam* right ;

(ii) any land held under ryotwari settlement ;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans ;]

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, <sup>35</sup>[*raiyat*, *under-raiyat*] or other intermediary and any rights or privileges in respect of land revenue.]

<sup>36</sup>[31-B. *Validation of certain Acts and Regulations.*—Without

32. Subs. by Sec. 2, *ibid* for sub-clause a with retrospective effect.

33. In its application to the State of Jammu and Kashmir, for sub-clause a of cl. 2 of Art. 31A, the following sub-clause shall be substituted, namely :—

• (a) 'estate' shall mean land which is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes—

(i) sites of buildings and other structures on such land :

(ii) trees standing on such land :

(iii) forest land and wooded waste ;

(iv) area covered by or fields floating over water ;

(v) sites of *jandars* and *gharats* ;

(vi) any *jagir*, *inam*, *muafi* or *mukarrari* or other similar grant, but does not include—

(i) the site of any yielding in any town or town area or village *abadi* or any land appurtenant to any such building or site ;

(ii) any land which is occupied as the site of a town or village ; or

(iii) any land reserved for building purposes in a municipality or notified area or cantonment or town area or any area for which a town planning scheme is sanctioned ;"

34. Subs. by the Madras State (Alteration of Name) Act, 1958 53 of 1968, Sec. 4, for "Madras" w.e.f. 14-1-1969]

35. Ins. by the Constitution (Fourth Amendment) Act, 1955, Sec. 3 (with retrospective effect).

36. Ins. by the Constitution (First Amendment) Act, 1951, Sec. 5,



prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force

<sup>1</sup>[31-C. *Saving of laws giving effect to certain directive principles.*—Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing <sup>2</sup>[all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 3 ; <sup>3</sup>[and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy : ]

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent ]

#### PART IV<sup>4</sup>

#### DIRECTIVE PRINCIPLES OF STATE POLICY

36. *Definition.*—In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

37. *Application of the principles contained in this Part.*—The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

38 *State to secure a social order for the promotion of welfare of the people.*—The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

39. *Certain principles of policy to be followed by the State.*—The State shall, in particular, direct its policy towards securing—

- (a) that the citizens, men and women equally, have the right to an adequate means to livelihood ;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

1. Ins. by the Constitution (Twenty-fifth Amendment) Act, 1971, Section 3 (w. e. f. 20-4-1972). Not applicable to the State of Jammu and Kashmir.
2. Ins. by the Constitution (Forty-second Amendment) Act, 1976, Section 4.
3. In *Kesavanada Bharati v. State of Kerala*, (1973) 4 SCC 225, the Supreme Court held the provision in brackets to be invalid.
4. Not applicable to the State of Jammu and Kashmir.

- (d) that there is equal pay for equal work for both men and women ;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;
- <sup>1</sup>(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment].

<sup>2</sup>[39-A. *Equal justice and free legal aid*—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities]

40 *Organisation of village panchayats*.—The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

41. *Right to work, to education and to public assistance in certain cases*.—The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

42 *Provision for just and human conditions of work and maternity relief*—The State shall make provision for securing just and humane conditions of work and for maternity relief.

43 *Living wage, etc., for workers*—The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

<sup>3</sup>[43-A. *Participation of workers in management of industries*.—The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry].

44. *Uniform civil code for the citizens*.—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

45 *Provision for free and compulsory education for children*.—The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

46. *Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections*.—The States shall promote with

1. Subs. by the Constitution (Forty-second Amendment) Act, 1976, Section 7.
2. Ins. by the Constitution (Forty-second Amendment) Act, 1976, Section 8.
3. Ins. by the Constitution (Forty-second Amendment) Act, 1976, Section 9.

special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

**47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.**—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

**48 Organisation of agriculture and animal husbandry**—The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

<sup>1</sup>[**48-A. Protection and improvement of environment and safeguarding of forests and wild life.**—The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country].

**49. Protection of monuments and place and objects of national importance.**—It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, <sup>2</sup>[declared by or under law made by Parliament] to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

**50. Separation of judiciary from executive.**—The State shall take steps to separate the judiciary from the executive in the public services of the State.

**51. Promotion of international peace and security.**—The State shall endeavour to—

- (a) promote international peace and security ;
- (b) maintain just and honourable relations between nations ;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and
- (d) encourage settlement of international disputes by arbitration.

## PART IVA

### FUNDAMENTAL DUTIES

**51-A. Fundamental duties**—It shall be the duty of every citizen of India—

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem ;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom ;
- (c) to uphold and protect the sovereignty, unity and integrity of India ;

1. Ins. by *ibid.*, Section 10.

2. Subs. by the Constitution (Seventh Amendment) Act, 1956, Section 27, for “declared by Parliament by law”.

3. Ins. by the Constitution (Forty-second Amendment) Act, 1976, Section 11.

- (d) to defend the country and render national service when called upon to do so ;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities ; to renounce practice derogatory to the dignity of women ;
- (f) to value and preserve the rich heritage of our composite culture ;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures ;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform ;
- (i) to safeguard public property and to abjure violence ;
- (j) to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement].

## PART V

### THE UNION

#### CHAPTER I—THE EXECUTIVE

##### *The President and Vice-President*

**52. *The President of India*** - There shall be a President of India

**53 *Executive power of the Union***—(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law

(3) Nothing in this article shall—

- (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority ; or
- (b) prevent Parliament from conferring by law functions on authorities other than the President.

**54. *Election of President.***—The President shall be elected by the members of an electoral college consisting of—

- (a) the elected members of both Houses of Parliament ; and
- (b) the elected members of the Legislative Assemblies of the States.

**55. *Manner of election of President.***—(1) As far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President.

(2) For the purpose of securing such uniformity among the States *inter se* as well as parity between the States as a whole and the Union, the number

1. For the purposes of this article, the population of the State of Jammu and Kashmir shall be deemed to be sixty-three lakhs.

of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner :—

- (a) every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly ;
- (b) if after taking the said multiples of one thousand, the remainder is not less than five hundred, than the vote of each member referred to in sub-clause (a) shall be further increased by one ;
- (c) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the States under sub-clauses (a) and (b) by the total number of the elected members of the Houses of Parliament, fractions exceeding one-half being counted as one and other fractions being disregarded.

(3) The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

<sup>1</sup>[*Explanation* —In this article, the expression “population” means the population ascertained at the last preceding census of which the relevant figures have been published :

Provided that the reference in this *Explanation* to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census ]

**56. Term of office of President** —(1) The President shall hold office for a term of five years from the date on which he enters upon his office :

Provided that—

- (a) the President may, by writing under his hand addressed to the Vice-President, resign his office ;
- (b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61 ;
- (c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice-President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

**57. Eligibility for re-election** —A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to that office.

**58. Qualifications for election as President** —(1) No person shall be eligible for election as President unless he—

- (a) is a citizen of India,

1. Subs. by the Constitution (Forty-second Amendment) Act, 1976, Section 12.

(b) has completed the age of thirty-five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

*Explanation.*—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor \* \* \* of any State or is a Minister either for the Union or for any State.

59. *Conditions of President's office.*—(1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

(2) The President shall not hold any other office of profit.

(3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule

(4) The emoluments and allowances of the President shall not be diminished during his term of office.

60. *Oath or affirmation by the President*—Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the senior-most Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

swear in the name of God

“I, A B., do—————that I will faithfully

solemnly affirm

execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India.”

61. *Procedure for impeachment of the President.*—(1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.

(2) No such charge shall be preferred unless—

(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and

1. The words “or Rajpramukh or Up-rajpramukh” omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Sch.

(b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

62 *Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.*—(1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after, and in no case later than six months from, the date of occurrence of the vacancy; and the person elected to fill the vacancy shall, subject to the provisions of Article 56, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

63 *The Vice-President of India.*—There shall be a Vice-President of India.

64 *The Vice-President to be ex-officio Chairman of the Council of States*—The Vice-President shall be *ex-officio* Chairman of the Council of States and shall not hold any other office of profit :

Provided that during any period when the Vice-President acts as President or discharges the functions of the President under Article 65, he shall not perform the duties of the office of Chairman of the Council of States and shall not be entitled to any salary or allowance payable to the Chairman of the Council of States under Article 97.

65 *The Vice-President to act as President or to discharge his functions during casual vacancies in the office, or during the absence, of President.*—(1) In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as President until the date on which a new President elected in accordance with the provisions of this Chapter to fill such vacancy enters upon his office.

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties.

(3) The Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

**66. Election of Vice-President.**—(1) The Vice-President shall be elected by the [members of an electoral college consisting of the members of both Houses of Parliament] in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot

(2) The Vice-President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected Vice-President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice-President.

(3) No person shall be eligible for election as Vice-President, unless he—

(a) is a citizen of India ;

(b) has completed the age of thirty-five years ;

(c) is qualified for election as a member of the Council of States.

(4) A person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments

*Explanation.*—For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor \* \* \* of any State or is a Minister either for the Union or for any State.

**67. Term of office of Vice-President.**—The Vice President shall hold office for a term of five years from the date on which he enters upon his office :

Provided that—

(a) a Vice-President may, by writing under his hand addressed to the President, resign his office ;

(b) a Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution ;

(c) a Vice-President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

**68. Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.**—(1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

(2) An election to fill a vacancy in the office of Vice-President occurring by reason of his death, resignation or removal, or otherwise shall be held as soon as possible after the occurrence of the vacancy, and the person elected

1. Subs. by the Constitution (Eleventh Amendment) Act, 1961, Section 2, for "members of both Houses of Parliament assembled at a joint meeting".
2. The words "or Rajpramukh or Uparajpramukh" omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Sch.



to fill the vacancy shall, subject to the provisions of Article 67, be entitled to hold office for the full term of five years from the date on which he enters upon his office.

**69. Oath or affirmation by the Vice-President.**—Every Vice-President shall, before entering upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation in the following form, that is to say—

swear in the name of God

“I, A. B., do————— that I will bear true faith  
solemnly affirm  
and allegiance to the Constitution of India as by law established and  
that I will faithfully discharge the duty upon which I am about to  
enter.”

**70. Discharge of President's functions in other contingencies**—Parliament may make such provisions as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter.<sup>1</sup>

**2[71. Matters relating to or connected with the election of a President or Vice-President.**—(1) Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President, including the grounds on which such election may be questioned :

Provided that the election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him.

(2) All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by such authority or body and in such manner as may be provided for by or under any law referred to in clause (1).

(3) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(4) If the election of a person as President or Vice-President is declared void under any such law as is referred to in clause (1), acts done by him in the exercise and performance of the powers and duties of the officer of President or Vice-President, as the case may be, on or before the date of such declaration shall not be invalidated by reason of that declaration.]

**72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases**—(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial ;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends ;

<sup>1</sup>. See the President (Discharge of Functions) Act, 1969.

<sup>2</sup>. Subs. by the Constitution (Thirty-nine Amendment) Act, 1975, s. 2 (10-8-75).

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor<sup>1\* \* \*</sup> of a State under any law for the time being in force.

**73. Extent of executive power of the Union.**—(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws ; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement :

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State<sup>2\* \* \*</sup> to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

### *Council of Ministers*

**74 Council of Ministers to aid and advise President.**—<sup>3</sup>(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice ]

<sup>4</sup>Provided that the President may require the Council of Ministers to reconsider such advice either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

**75. Other provisions as to Ministers.**—(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister

1. The words 'or Rajpramukh' omitted by the Constitution (Seventh Amendment) Act, 1956, Sec. 29 and Sch.

2. The words and letters "specified in part A or Part B of the First Schedule" omitted by Sec. 29 and Sch., *ibid*.

3. Subs. by the Constitution (Forty-second Amendment) Act, 1976, Sec. 13 for Cl. (1) w. e. f. 3-1-1977: The clause, as originally enacted ran as follows :

'74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in exercise of his functions'.

4. Ins. by the Constitution (Forty-fourth Amendment) Act, 1978 Sec. 11 w. e. f. 20-6-1979.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

### *Conduct of Government Business*

77. *Conduct of business of the Government of India*—(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules<sup>1</sup> to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

<sup>2</sup>[(4) No Court or other authority shall be entitled to require the production of any rules made under Clause (3) for the more convenient transaction of the business of the Government of India].

73 *Duties of Prime Minister as respects the furnishing of information to the President, etc.*—It shall be the duty of the Prime Minister—

- (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposal for legislation ;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for ; and
- (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

## CHAPTER III

### *Legislative Powers of the President*

123 *Power of President to promulgate Ordinances during recess of Parliament.*—(1) If at any time, except when both Houses of Parliament are in

- \* 1. See Notification No. S. O. 2297, dated the 3rd November, 1958, *Gazette of India Extraordinary*, 1958, Part II, Section 3 (ii), p. 1315, as amended from time to time.
- 2. Ins. by the Constitution (Forty-second Amendment) Act, 1976, Section 14.

session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions ; and

(b) may be withdrawn at any time by the President.

*Explanation.*—Where the Houses of Parliament are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

<sup>1</sup>[(4) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground ]

## PART VI

### THE STATES <sup>2</sup>\* \* \*

#### CHAPTER II.—THE EXECUTIVE

##### *The Governor*

<sup>3</sup>153. *Governors of States.*—There shall be a Governor for each State :

<sup>4</sup>[Provided that nothing in this article shall prevent the appointment of the same person as Governor for two or more States ]

<sup>3</sup>[154. *Executive power of State*—The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Nothing in this article shall—

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority ; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

1. Ins. by the Constitution (Thirty-eight Amendment) Act, 1975, Section 2 (retrospectively).
2. The words "IN PART A OF THE FIRST SCHEDULE" omitted by the Constitution (Seventh Amendment) Act, 1956, Sec. 29 and Sch.
3. Arts. 153, 154, 155, 156, 157 and 158 shall not apply to the State of Jammu and Kashmir.
4. Added by the Constitution (Seventh Amendment) Act, 1956, Sec. 6.

**155. Appointment of Governor.**—The Governor of a State shall be appointed by the President by warrant under his hand and seal.

**156. Term of office of Governor.**—(1) The Governor shall hold office during the pleasure of the President.

(2) The Governor may, by writing under his hand addressed to the President, resign his office.

(3) Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office :

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

**157. Qualifications for appointment as Governor.**—No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years.

**158 Conditions of Governor's office.**—(1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.

(2) The Governor shall not hold any other office of profit.

(3) The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.

<sup>1</sup>[(3-A) Where the same person is appointed as Governor of two or more States, the emoluments and allowances payable to the Governor shall be allocated among the States in such proportion as the President may by order determine.]

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office.

**159 Oath or affirmation by the Governor.**—Every Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court exercising jurisdiction in relation to the State, or in his absence, the seniormost Judge of that Court available, an oath or affirmation in the following form, that is to say—

swear in the name of God

“I, A. B., do————— that I will faithfully execute  
solemnly affirm

the office of Governor (or discharge the functions of the Governor) of... ..  
(name of the State) and will to the best of my ability preserve, protect  
and defend the Constitution and the law and that I will devote myself  
to the service and well-being of the people of ... .. (name of  
the State).”

\*1. Ins. by the Constitution (Seventh Amendment) Act, 1956, Sec. 7.

2. Arts. 159, 160, 161 and 162 shall not apply to the State of Jammu and Kashmir.

**160. Discharge of the functions of the Governor in certain contingencies.**—The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter.

**161. Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.**—The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

**162. Extent of executive power of State.**—Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof

#### *Council of Ministers*

**163. Council of Ministers to aid and advise Governor.**—(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court.

**164. Other provisions as to Ministers.**—(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor :

Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

### *Conduct of Government Business*

<sup>1</sup>166 *Conduct of business of the Government of a State.*—(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion

<sup>2</sup>[ (4) No court or other authority shall be entitled to require the production of any rules made under clause (3) for the more convenient transaction of the business of the Government of the State].

<sup>1</sup>167. *Duties of Chief Minister as respects the furnishing of information to Governor, etc.*—It shall be the duty of the Chief Minister of each State—

- (a) to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation ;
- (b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for ; and
- (c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

### CHAPTER IV—LEGISLATIVE POWER OF THE GOVERNOR

<sup>3</sup>213 *Power of Governor to promulgate Ordinances during recess of Legislature*—(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

- (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature ; or
1. Arts 166, 167 shall not apply to state of Jammu and Kashmir.
  2. Ins. by the Constitution (Forty-second Amendment) Act 1976 Section 28.
  3. Art. 213 shall not apply to the Jammu and Kashmir.

- (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President ; or
- (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor but every such Ordinance—

- (a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council ; and
- (d) may be withdrawn at any time by the Governor

*Explanation*—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void :

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act, of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

<sup>1</sup>[ (4) Notwithstanding anything in this Constitution, the satisfaction of the Governor mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground.]

## CHAPTER II—ADMINISTRATIVE RELATIONS

### *General*

**256. *Obligation of States and the Union.***—The executive power of every State shall be so exercised as to ensure compliance with the laws

1. Ins. by the Constitution (Thirty-eighth Amendment) Act, 1975, Section 3 (retrospectively).
2. In its application to the State of Jammu and Kashmir, Art. 256 shall be renumbered as Cl. (1) of that article and the following new clause shall be added thereto :—

“(2) The State of Jammu and Kashmir shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State ; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.”



made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

**257. Control of the Union over States in certain cases.**—(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance :

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force-works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railways, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

**1[257-A. Assistance to States by deployment of armed forces or other forces of the Union.**—(1) The Government of India may deploy any armed force of the Union or any other force subject to the control of the Union for dealing with any grave situation of law and order in any State.

(2) Any armed force or other force or any contingent or unit thereof deployed under clause (1) in any State shall act in accordance with such directions as the Government of India may issue and shall not, save as otherwise provided in such directions, be subject to the superintendence or control of the State Government or any officer or authority subordinate to the State Government.

(3) Parliament may, by law, specify the powers, functions, privileges and liabilities of the members of any force or any contingent or unit thereof deployed under clause (1) during the period of such deployment ]

**258. Power of the Union to confer powers, etc., on States in certain cases**—(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of

the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

**11258-A. Power of the States to entrust functions to the Union**—Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive powers of the State extends.

**259. [Armed Forces in States in Part B of the First Schedule]** Rep. by Constitution (Seventh Amendment) Act, Section 29 and Sch.

**260. Jurisdiction of the Union in relation to territories outside India.**—The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

**296 Property accruing by escheat or lapse or as bona vacantia**—Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State and shall; in any other case, vest in the Union :

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

**Explanation**—In this Article, the expressions “Ruler” and “Indian State” have the same meanings as in Article 363.

**11297. Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.**—(1) All lands, minerals and other things of value underlying the ocean within the territorial waters or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

1. Ins. by the Constitution (Seventh Amendment) Act, 1956, Sec. 18

2. Subs. by the Constitution (Fortieth Amendment) Act, 1976, Sec. 2.

**1[<sup>1</sup> 298. Power to carry on trade, etc.**—The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purposes :

Provided that—

- (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, the subject in each State to legislation by the State ; and
- (b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the the State Legislature may make laws, be subject to legislation by Parliament ]

**299. Contracts** —(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor \* \* \* of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or Governor \* \* \* by such persons and in such manner as he may direct or authorise.

(2) Neither the President nor the Governor \* \* \* shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

**300 Suits and proceedings** —(1) Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

- (a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings ; and
- (b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

1. Subs. by the Constitution (Seventh Amendment) Act, 1956, Sec. 20, for the original Art. 298.
2. In its application to the State of Jammu and Kashmir, in Arts. 298 and 299 references to the State or States shall be construed as not including references to the State of Jammu and Kashmir.
3. The words "or the Rajpramukh" omitted by the Constitution (Seventh Amendment) Act, 1956, Sec. 29, and Sch.
4. Ibid, The words "or the Rajpramukh" omitted by Sec. 29, and Sch.,
5. In its application to the State of Jammu and Kashmir in Art. 300 references to the State or States shall be construed as not including references to the State of Jammu and Kashmir,

**1P372-A Power of the President to adapt laws.—**(1) For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order<sup>1</sup> made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adopted or modified by the President under the said clause].

1. Ins. by the Constitution (Seventh Amendment) Act, 1956, Sec. 23.
2. Arts 372-A and 373 shall not apply to the State of Jammu and Kashmir.
3. See the Adaption of Laws Orders of 1966 and 1957.

# SCHEDULES

## <sup>1</sup>[FIRST SCHEDULE

[Articles 1 and 4]

### I. THE STATES

<i>Name</i>	<i>Territories</i>
1. Andhra Pradesh	<sup>2</sup> [The territories specified in sub-section (1) of Section 3 of the Andhra State Act, 1953, sub-section (1) of Section 3 of the States Reorganisation Act, 1956, the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, and the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968, but excluding the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 ]
2. Assam	The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951, <sup>3</sup> and the territories specified in sub-section (1) of Section 3 of the State of Nagaland Act, 1962] <sup>4</sup> [and the territories specified in Sections 5, 6 and 7 of the North-Eastern Areas (Reorganisation) Act, 1971].
3. Bihar	<sup>5</sup> [The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province and the territories specified in clause (a) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956, and the territories specified in clause (b) of

1. Subs. by the Constitution (Seventh Amendment) Act, 1956. Sec. 2, for Schedule I.
2. Subs. by the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968 (36 of 1968), Sec. 4, for the former entry (w. e. f. 1-10-1968).
3. Added by the State of Nagaland Act, 1962 (27 of 1962), Sec. 4 (w. e. f. 1-12-1963).
4. Added by the North-Eastern Areas (Reorganisation) Act, 1971, Sec. 9 w. e. f. 21-1-1972).
5. Subs. by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (24 of 1968) Sec. 4. for former entry (w. e. f. 10-6-1970).

## Name

## Territories

- sub-section (1) of Section 3 of the first mentioned Act.]
64. Gujarat - The territories referred to in sub-section (1) of Section 3 of the Bombay Reorganisation Act, 1960.]
5. Kerala The territories specified in sub-section (1) of Section 5 of the States Reorganisation Act, 1956.
- 6 Madhya Pradesh The territories specified in sub-section (1) of Section 9 of the States Reorganisation Act, 1956 <sup>7</sup>[and the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959].<sup>7</sup>
87. Tamil Nadu The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in Section 4 of the States Reorganisation Act, 1956, <sup>9</sup>[and the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959,] but excluding the territories specified in sub-section (1) of Section 3 and sub-section (1) of Section 4 of the Andhra State Act, 1953, and <sup>10</sup>[the territories specified in clause (b) of sub-section (1) of Section 5, Section 6 and clause (d) of sub-section (1) of Section 7 of the States Reorganisation Act, 1956 and the territories specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries Act, 1959].
113. Maharashtra The territories specified in sub-section (1) of Section 8 of the States Reorganisation Act, 1956, but excluding the territories referred to in sub-section (1) of Section 3 of the Bombay Reorganisation Act, 1960.]<sup>11</sup>

6. Subs. by the Bombay Reorganisation Act, 1960 (11 of 1960), Sec. 4, for entry 4 (w. e. f. 1-5-1950).

7. Ins. by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 (47 of 1959), Sec. 4. (w. e. f. 1-10-1959).

8. Subs. by the Madras State (Alteration of name) Act, 1968 (53 of 1968), Sec. 5, for "7, Madras" (w. e. f. 14-1-1969).

9. Ind. by the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (56 of 1959), Sec. 6 (w. e. f. 1-4-1960).

10. Subs. by Sec. 6, *ibid.*, for certain words (w. e. f. 1-4-1960).

11. Ins. by the Bombay Reorganisation Act, 1960 (11 of 1960), Sec. 4 (w. e. f. 1-5-1960).

Name	Territories
129 Karnataka	The territories specified in sub-section (1) of Section 7 of the States Reorganisation Act, 1956 <sup>12</sup> [but excluding the territory specified in the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.]
1410 Orissa	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province.
1414. Punjab	The territories specified in Section 11 of the States Reorganisation Act, 1956 <sup>15</sup> and the territories referred to in Part II of the First Schedule to the Acquired Territories (Merger) Act, 1960] <sup>16</sup> [but excluding the territories referred to in Part II of the Schedule to the Constitution (Ninth Amendment) Act, 1960] <sup>17</sup> [and the territories specified in sub-section (1) of Section 3, Section 4 and sub-section (1) of Section 5 of the Punjab Reorganisation Act, 1966].
1412 Rajasthan	The territories specified in Section 10 of the State Reorganisation Act, 1956 <sup>18</sup> [but excluding the territories specified in the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1956].
1413. Uttar Pradesh	<sup>19</sup> [The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province and the territories specified in clause (b) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in clause (a) of sub-section (1) of Section 3 of that Act.]

12. Subs. by the Mysore State (Alteration of Name) Act, 1973 (31 of 1973), Sec. 5, for "9. Mysore" (w. e. f. 1-11-1973).

13. Ins. by the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968 (36 of 1968), Sec. 4 (w. e. f. 1-10-1968).

14. Entries 8 to 14 renumbered as 9 to 15 by the Bombay Reorganisation Act, 1960 (11 of 1960), Sec. 4 (w. e. f. 1960).

15. Ins. by the Acquired Territories (Merger) Act, 1960 (64 of 1960), Sec. 4 (w. e. f. 17-1-1961).

16. Added by the Constitution (Ninth Amendment) Act, 1960, Sec. 3 (w. e. f. 17-1-1961).

17. Ins. by the Punjab Reorganisation Act, 1966 (31 of 1966), Sec. 7 (w. e. f. 1-11-1966).

18. Ins. by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 (47 of 1959), Sec. 4 (w. e. f. 1-10-1959).

19. Subs. by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (24 of 1968), Sec. 4, for the entry (w. e. f. 10-6-1970).

<i>Name</i>	<i>Territories</i>
<sup>20</sup> 14. West Bengal	The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (c) of Section 2 of the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.
<sup>20</sup> 15. Jammu and Kashmir	The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.
<sup>21</sup> 16. Nagaland	The territories specified in sub-section (1) of Section 3 of the State of Nagaland Act, 1962.]
<sup>22</sup> 11. Haryana	The territories specified in sub-section (1) of Section 3 of the Punjab Reorganisation Act, 1966.]
<sup>23</sup> 18. Himachal Pradesh	The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioner's Province under the names of Himachal Pradesh and Bilaspur and the territories specified in sub section (1) of Section 5 of the Punjab Reorganisation Act, 1966.]
<sup>24</sup> 19. Manipur	The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.
20. Tripura	The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.
21. Meghalaya	The territories specified in Section 5 of the North-Eastern Areas (Reorganisation) Act, 1971].
20. Entries 8 to 14 renumbered as 9 to 15 by the Bombay Reorganisation Act, 1960 (11 of 1960), Sec. 4 (w. e. f. 1-5-1960).	
21. Ins. by the State of Nagaland Act, 1962 (27 of 1962), Sec. 4 (w. e. f. 1-12-1963).	
22. Ins. by the Punjab Reorganisation Act, 1966 (31 of 1966), Sec. 7 (w. e. f. 1-11-1966).	
23. Ins. by the State of Himachal Pradesh Act, 1970 (53 of 1970), Sec. 4 (w. e. f. 25-1-1971).	
24. Ins. by the North-Eastern Area (Reorganisation) Act, 1971 (81 of 1971), Sec. 9 (w. e. f. 2-1-1982).	



<i>Name</i>	<i>Territories</i>
25[22]. Sikkim	The territories which immediately before the commencement of the Constitution (Thirty-sixth Amendment) Act, 1975, were comprised in Sikkim.]

## II THE UNION TERRITORIES

<i>Name</i>	<i>Extent</i>
1.	The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi.
26*	*
27*	*
28[2.] The Andaman and Nicobar Islands.	The territory which immediately before the commencement of the Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Island.
28[3. 29[Lakshadweep.]	The territory specified in Section 6 of the States Reorganisation Act, 1956.
30[28[4. Dadra and Nagar Haveli	The territory which immediately before the eleventh day of August, 1961 was comprised in Free Dadra and Nagar Haveli ]
31[28[5.] Goa, Daman and Diu	The territory which immediately before the twentieth day of December, 1961 were comprised in Goa, Daman and Diu.]
32[28[6.] Pondicherry	The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam ]
33[28[7. Chandigarh	The territories specified in Section 4 of the Punjab Reorganisation Act, 1966.]
34[8. Mizoram	The territories specified in Section 6 of the North-Eastern Areas (Reorganisation) Act, 1971.
9. Arunachal Pradesh	The territories specified in Section 7 of the North-Eastern Areas (Reorganisation) Act, 1971 ]

25. Ins. by the Constitution (Thirty-sixth Amendment) Act, 1975, Sec. 2 (w. e. f. 26-4-1975).

26. Entry 2 relating to "Himachal Pradesh" omitted by the State Himachal Pradesh Act, 1970 (53 of 1970), Sec. 4 (w. e. f. 25-1-1971).

27. Entries relating to Manipur and Tripura omitted by the North-Eastern Areas (Reorganisation) Act, 1971 (81 of 1971), Sec. 9 w. e. f. 21-1-1972).

28. Entries 4 to 9 renumbered as Entries 2 to 7 by North-Eastern Areas (Reorganisation) Act, 1971 (81 of 1971), Sec. 9 (w. e. f. 21-1-1972).

29. Subs. by the Lakshadweep, Minicoy and Amindivi Islands (Alteration of name) Act, 1973 (34 of 1973), Sec. 5, (w. e. f. 1-11-1973).

30. Ins. by the Constitution (Tenth Amendment) Act, 1961, Sec. 2.

31. Ins. by the Constitution (Twelfth Amendment) Act, 1963, Sec. 2.

32. Ins. by the Constitution (Fourteenth Amendment) Act, 1962, Secs. 3 and 7.

33. Ins. by the Punjab Reorganisation Act, 1966 (31 of 1966), Sec. 7 (w. e. f. 1-11-1966).

34. Ins. by the North-Eastern Areas (Reorganisation) Act, 1971 (81 of 1971), Sec. 9 (w. e. f. 21-1-1972).

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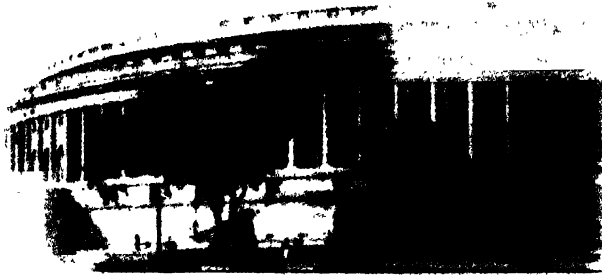












# CONSTITUTION OF INDIA

**JAGADISH SWARUP**

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens .

JUSTICE, social, economic and political ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status and of opportunity ;  
and to promote among them

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation ;

IN OUR CONSTITUENT ASSEMBLY the twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES  
CONSTITUTION.